No. 14-275

Title:	Marvin D. Horne, et al., Petitioners
	v.
	Department of Agriculture
Docketed:	September 8, 2014
Linked with 14A44	
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Nos.:	(10-15270)
Decision Date:	May 9, 2014

Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Jul 10 2014	Application (14A44) to extend the time to file a petition for a writ of certiorari from August 7, 2014 to September 8, 2014, submitted to Justice Kennedy.
Jul 16 2014	Application (14A44) granted by Justice Kennedy extending the time to file until September 8, 2014.
Sep 8 2014	Petition for a writ of certiorari filed. (Response due October 8, 2014)
Sep 15 2014	Consent to the filing of amicus curiae briefs, in support of either party or neither party, received from counsel for respondent.
Sep 15 2014	Consent to the filing of amicus curiae briefs, in support of either party or neither party, received from counsel for petitioners.
Sep 30 2014	Order extending time to file response to petition to and including November 7, 2014.
Oct 7 2014	Brief amicus curiae of Texas filed.
Oct 8 2014	Brief amici curiae of Cato Institute, et al. filed.
Oct 8 2014	Brief amici curiae of DKT Liberty Project, and Eighteen Independent Raisin Growers filed.
Oct 8 2014	Brief amicus curiae of Chamber of Commerce of the United States of America filed.
Oct 8 2014	Brief amicus curiae of Mountain States Legal Foundation filed.
Oct 8 2014	Brief amici curiae of Constitutional and Property Law Scholars filed.
Oct 8 2014	Brief amicus curiae of Pacific Legal Foundation filed.
Nov 4 2014	Order further extending time to file response to petition to and including December 8, 2014.
Dec 8 2014	Brief of respondent United States Department of Agriculture in opposition filed.
Dec 22 2014	Reply of petitioners Marvin D. Horne, et al. filed.
Dec 23 2014	DISTRIBUTED for Conference of January 9, 2015.
Jan 12 2015	DISTRIBUTED for Conference of January 16, 2015.
Jan 16 2015	Petition GRANTED.
Feb 24 2015	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioners.
Feb 27 2015	Consent to the filing of amicus curiae briefs, in support of either party or of neither

	party, received from counsel for the respondent.
Mar 2 2015	Joint appendix filed.
Mar 2 2015	Brief of petitioners Marvin D. Horne, et al. filed.
Mar 4 2015	Brief amici curiae of Baylen J. Linnekin and Keep Food Legal Foundation filed.
Mar 6 2015	SET FOR ARGUMENT ON Wednesday, April 22, 2015
Mar 9 2015	Brief amici curiae of Texas, et al. filed.
Mar 9 2015	Brief amicus curiae of Center for Constitutional Jurispurdence filed.
Mar 9 2015	Brief amici curiae of Cato Institute, et al. filed.
Mar 9 2015	Brief amici curiae of DKT Liberty Project, and Thirty-Three Independent Raisin Growers filed.
Mar 9 2015	Brief amicus curiae of Washington Legal Foundation filed.
Mar 9 2015	Brief amicus curiae of Pacific Legal Foundation filed.
Mar 9 2015	Brief amicus curiae of Mountain States Legal Foundation filed.
Mar 9 2015	Brief amicus curiae of Chamber of Commerce of the United States of America filed.
Mar 9 2015	Brief amicus curiae of Institute for Justice filed.
Mar 9 2015	Brief amicus curiae of Federal Circuit Bar Association filed.
Mar 9 2015	Brief amici curiae of Constitutional and Property Law Scholars filed.
Mar 9 2015	Brief amicus curiae of The Rutherford Institute filed.
Mar 16 2015	CIRCULATED.
Mar 17 2015	Record requested from U.S.C.A. 9th Circuit.
Mar 17 2015	Record from U.D.C.A. 9th Circuit is electronic and located on PACER.
Mar 25 2015	Record from U.S.D.C. Eastern District of California is electronic. (Adminstrative record)
Apr 1 2015	Brief of respondent Department of Agriculture filed. (Distributed)
Apr 8 2015	Brief amici curiae of Sun-Maid Growers of California, et al. filed. (Distributed)
Apr 8 2015	Brief amicus curiae of International Municipal Lawyers Association filed. (Distributed)
Apr 15 2015	Reply of petitioners Marvin D. Horne, et al. filed. (Distributed)
Apr 22 2015	Argued. For petitioners: Michael W. McConnell, Washington, D. C. For respondent: Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D. C.
Apr 29 2015	Letter from the Solicitor General received and distributed.
Jun 22 2015	Judgment REVERSED. Roberts, C. J., delivered the opinion of the Court, in which Scalia, Kennedy, Thomas, and Alito, JJ., joined, and in which Ginsburg, Breyer, and Kagan, JJ., joined as to Parts I and II. Thomas, J., filed a concurring opinion. Breyer, J., filed an opinion concurring in part and dissenting in part, in which Ginsburg and Kagan, JJ., joined. Sotomayor, J., filed a dissenting opinion.
Jul 24 2015	JUDGMENT ISSUED.

14-275

No. _____

IN THE

Supreme Court of the United States

MARVIN D. HORNE, *et al.*,

Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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September 8, 2014

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QUESTIONS PRESENTED

The questions presented by this petition are:

1. Whether the government's "categorical duty" under the Fifth Amendment to pay just compensation when it "physically takes possession of an interest in property," *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012), applies only to real property and not to personal property.

2. Whether the government may avoid the categorical duty to pay just compensation for a physical taking of property by reserving to the property owner a contingent interest in a portion of the value of the property, set at the government's discretion.

3. Whether a governmental mandate to relinquish specific, identifiable property as a "condition" on permission to engage in commerce effects a per se taking.

RULE 14.1(b) STATEMENT

Petitioners are Marvin D. Horne and Laura R. Horne, d.b.a. Raisin Valley Farms, a partnership, and d.b.a. Raisin Valley Farms Marketing Association, a.k.a. Raisin Valley Marketing, an unincorporated association; Marvin D. Horne; Laura R. Horne; the Estate of Don Durbahn, and the Estate of Rena Durbahn, d.b.a. Lassen Vineyards, a partnership, plaintiffs-appellants below.

Respondent is the United States Department of Agriculture, defendant-appellee below.

RULE 29.6 STATEMENT

Petitioners have no parent corporations and no publicly held corporation owns 10% or more of their stock.

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INTRODUCTION

This case presents the important question of whether the federal government can seize ownership, each year, of a large portion of a farmer's raisin crop without paying the just compensation required by the Takings Clause of the Fifth Amendment. This Court has already held, unanimously, that Petitioners have the right to assert their just compensation rights in federal court. On remand, the same panel of the Ninth Circuit denied their claim on the merits.

As the Court is aware from the earlier phase of this litigation, the United States Department of Agriculture ("USDA") requires "handlers" of raisins to set aside portions of the raisins they obtain from raisin producers, and to transfer ownership of those raisins to the government. In the two years at issue in this case, 2002-2003 and 2003-2004, the USDA required transfer of 47 percent and 30 percent of each producer's crop, respectively. Raisin handlers who do not comply — including Petitioners here — face large fines.

Confiscation of property ownership implicates the Fifth Amendment's categorical rule of just compensation. And yet the USDA hardly even pretends to offer just compensation in return for that appropriation. The USDA paid farmers like the Hornes nothing at all for their 2003-2004 raisins, and less than the cost of production for their 2002-2003 raisins.

The regulations at issue are, in short, a textbook case of an uncompensated taking. Nonetheless, the Ninth Circuit rejected Petitioners' claims for the *third* time, and the second time on the merits, each

time based on different rationales. The panel's newest set of rationales conflicts with this Court's governing precedents, creates multiple conflicts with other appellate courts, and threatens a dramatic curtailment of property rights generally.

In this iteration of the case, the panel offered three reasons for determining that Petitioners are not entitled to just compensation. *First*, the panel reasoned that the categorical takings rule for seizures of property applies only to *real* property, not to personal property (like raisins). *Second*, the panel concluded that even if that categorical rule could have applied to raisins, it does not apply here because the USDA theoretically offers raisin handlers something in return (never mind that the return is often nothing at all). *Third*, the panel compounded those errors by treating the USDA's regulations as a use restriction, subject only to a balancing test that had heretofore been used only in the context of land-use permitting. None of those steps is consistent with this Court's takings doctrine, and each one creates deep splits in the caselaw that call for immediate resolution.

The conflicts between the Ninth Circuit's decision and the holdings of this Court and other federal courts are more than enough to justify this Court's intervention, for a second time, in the government's treatment of raisin production. But what is truly shocking is the evisceration of Takings Clause doctrine that the Ninth Circuit's holdings imply. If it were really true that the government *never* faces a "categorical duty" of just compensation (*see Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012)) when it takes ownership of a

person's movable property, and that it can escape the duty simply by offering a discretionary possibility of partial payment in return, the just-compensation requirement for physical takings — which has been the core of the Takings Clause's protections for more than 200 years — is essentially a dead letter. No less disturbing is the notion that whenever a person wishes to use his property in commerce, the government can demand its cut, subject only to a balancing test. But today, astonishingly, that is the law in the Ninth Circuit.

The Ninth Circuit's restrictions on the Takings Clause's categorical protection against government appropriation of property cannot be allowed to stand. This Court should grant review and reverse.

OPINIONS BELOW

The opinion of the court of appeals on remand from this Court is reported at 750 F.3d 1128. Pet.App. 1a. This Court's opinion is reported at 133 S. Ct. 2053. Pet.App. 242a. This Court's opinion reversed an earlier opinion of the court of appeals reported at 673 F.3d 1071. Pet.App. 220a. That opinion of the court of appeals itself superseded the court of appeals' original decision which was designated for publication, but was undesignated upon the issuance of the court of appeals' second opinion. Pet.App. 191a, 260-61a. The opinion of the district court is unpublished, and is electronically reported at 2009 WL 4895362. Pet.App. 125a.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 2014. Pet.App. 1a. On July 16, 2014, Justice Kennedy extended the time for filing a

petition for certiorari to and including September 8, 2014 (No. 14A44). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Ninth Circuit had jurisdiction under 28 U.S.C. §§ 1291 and 1331.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides, in relevant part:

> [N]or shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

The relevant provisions of the Agricultural Marketing Agreement Act of 1937 ("AMAA"), as amended, 7 U.S.C. § 601 *et seq.*; and the *Marketing Order Regulating the Handling of Raisins Produced from Grapes Grown in California*, 7 C.F.R. Part 989 ("Raisin Marketing Order" or "the Order"), are reproduced in the appendix to this petition. *See* Pet.App. 262a-372a.

STATEMENT OF THE CASE

A. Statutory And Regulatory Framework

Under the AMAA, the USDA regulates the sale of certain agricultural products, including raisins, through the use of "marketing orders." *See Evans v. United States*, 74 Fed. Cl. 554, 558 (2006). In general, these orders establish food product "reserve" programs under which farmers must set aside a specified portion of their crop "for the account of" the federal government. *Id.* at 557.

This case involves what what one court has described as the most "draconian" of these marketing order schemes — the marketing order for California raisins, which constitute approximately 99 percent of the United States' and 40 percent of the world's raisin production. Pet.App. 225a n.7; *Evans*, 74 Fed. Cl. at 555. While similar in some respects to orders regulating other agricultural segments, the Raisin Marketing Order is different in two primary ways: "it effects a direct transfer of title of a producer's 'reserve tonnage' raisins to the government, and it requires physical segregation of the reserve-tonnage raisins held for the government's account." *Evans*, 74 Fed. Cl. at 558; *see also* 7 C.F.R. §§ 989.54, 989.55, 989.65, 989.66. Unlike other marketing orders, which are periodically put to a vote of producers and terminated if they do not command a specified majority or super-majority, *see* 7 U.S.C. § 608c(19), the Raisin Marketing Order has never been put to a revote of raisin producers since its first adoption in 1949.

The marketing order applies only to "handlers" of raisins, a term defined at 7 C.F.R. § 989.15. Raisin farmers sell their crop to handlers, who process, pack, and sell the raisins to consumers. Under the Order, the Raisin Administrative Committee ("RAC"), an agent of the USDA, establishes yearly raisin tonnage requirements, known as "reserve tonnage" and "free tonnage" percentages. §§ 989.66, 989.166. The percentages are established by (and unknown until) February 15 of each crop year, long after farmers have expended substantial resources for the cultivation and harvest of their crop for the year. §§ 989.21, 989.54(d). Once the percentages are fixed, handlers of raisins must set aside the "reserve

tonnage" requirement "for the account" of the RAC. §§ 989.65, 989.66(a), (b)(1). Handlers pay producers only for the free-tonnage raisins. *Evans*, 74 Fed. Cl. at 557. Handlers pay nothing to producers for the reserve-tonnage raisins that they transfer to the government. *Id.* The AMAA provides that any "handler" who violates a marketing order may be subject to fines and penalties in a final USDA order. 7 U.S.C. §§ 608a(5), 608c(14); 7 C.F.R. § 989.166(c).

Once it has control of the reserve-tonnage raisins, the RAC may require their delivery to anyone chosen by the RAC to receive them, 7 C.F.R. § 989.66(b)(4), may obtain loans using reserve-tonnage raisins as security, § 989.66(g), may sell reserve-tonnage raisins to handlers for resale in export markets, §§ 989.67(c)-(e), or may direct that the raisins be sold or disposed of by direct sale or gift to United States agencies, foreign governments, or charitable organizations, §§ 989.67(b)(2)-(4). When the RAC sells its reserve-tonnage raisins, it uses the proceeds to fund its own administrative costs as well as to provide export subsidies to favored handlers. Unexpended proceeds, if any, must be remitted to producers on a pro rata basis. 7 U.S.C. § 608c(6)(E); 7 C.F.R. § 989.53(a), 989.66(h).

In the two years relevant to this case, 2002-2003 and 2003-2004, the USDA required farmers to turn over 47 percent and 30 percent of their raisin crops respectively. *See* RAC, *Marketing Policy and Industry Statistics, 2010*, at 27, *available at* http://www.raisins.org/files/Marketing%20Policy%202010.pdf (last visited Sept. 3, 2014). Through the reserve-tonnage set-aside, the government obtained, respectively, 22.1 million and 38.5 million pounds of

raisins in those two years. *See id.* at 20. In 2002-2003, the farmers who produced those raisins were paid well below the cost of production (and considerably less than fair market value). *See* RAC, *Analysis Report* 22 (Aug. 1, 2006), *available at* http://www.raisins.org/analysis_report/analysis_report.pdf (last visited Sept. 3, 2014). In 2003-2004, the government paid nothing at all for the 38.5 million pounds of raisins that it took and used. *See id.* at 23; *see also id.* at 55.

B. The Hornes' Attempt To Comply Without Suffering Confiscation Of Their Raisins

The Hornes and the Durbahns (hereinafter "the Hornes" or "Petitioners") are independent farmers in Fresno and Madera Counties in California. Pet.App. 247a. Petitioners Marvin and Laura Horne have grown Thompson seedless grapes for raisins for nearly half a century, and Don and Rena Durbahn (Laura's parents), recently deceased, a generation longer. Pet.App. 33a, 247a.

Like many raisin farmers, the Hornes became increasingly frustrated with the workings of the Raisin Marketing Order, which they regard as "stealing [their] crop." Pet.App. 129a. As they explained in a letter to the Secretary of Agriculture, "[t]he Marketing Order Regulating Raisins has become a tool for grower bankruptcy, poverty, and involuntary servitude." Pet.App. 130a, 247a n.3. After consulting with attorneys, university professors, and officials, the Hornes devised a new business model that they believed would allow them to comply with the law without having to set aside reserve raisins for the RAC. Pet.App. 247a. The

Hornes purchased their own equipment for processing and packing raisins. Pet.App. 247a. Instead of selling their crop to a traditional handler, they processed the raisins on their own equipment and sold them directly to wholesale customers such as food-processing companies and bakeries, eliminating the middle-man. Pet.App. 247a. Because the obligations of the Raisin Marketing Order apply only to "handlers," the Hornes believed they would not be required to disgorge the "reserve" portion of their raisin crop to the RAC. Pet.App. 247a.

The Hornes also allowed some 60 of their neighbors to lease this equipment for their own raisins. Pet.App. 247a. Under this arrangement, the other producers would lease the Horne's equipment for a per-ton fee. The Hornes and their neighbors coordinated sales through the "Raisin Valley Farms Marketing Association," which connected prospective purchasers with producers on a rotational basis. Pet.App. 38a. Purchasers would pay the Raisin Valley Farms Marketing Association, which would then disburse payment to the producers, less the rental fee for use of the equipment. Pet.App. 38a-39a, 130a-131a. Accordingly, the producers who used the Hornes' equipment received full market price for their raisins, without having portions of their crop segregated and turned over to the government.

Because they believed this business model would avoid application of the reserve requirement, the Hornes did not set aside reserve-tonnage raisins for 2002-2003 and 2003-2004, the two years relevant to this case, for either their own raisins or those of

other producers who leased their equipment. Pet.App. 132a-133a, 248a.

C. Proceedings Below

On April 1, 2004, the Administrator of the Agricultural Marketing Service initiated an enforcement action within the USDA, claiming that Petitioners violated the AMAA. Pet.App. 30a-31a, 248a. According to the Administrator, because all producers who sell any portion of their crop are effectively "handlers" subject to the Order, the Hornes became handlers by marketing their own raisins. Pet.App. 31a, 248a.

A USDA Administrative Law Judge ("ALJ") agreed. Pet.App. 32a-33a, 249a. The ALJ reasoned that the requirement that Petitioners hand over their raisins to the USDA without compensation "cannot be used as grounds for a taking claim since handlers no longer have a property right that permits them to market their crop free of regulatory control." Pet.App. 45a. The Hornes were also held responsible as handlers of raisins produced by other producers — who had, again, sold their raisins for full price — on the theory that the Hornes had "acquired" the raisins from those farmers within the meaning of the Marketing Order when the raisins arrived at the Hornes' processing facility. Pet.App. 47a-50a, 52a; *see also* Pet.App. 84a. Thus, the Hornes personally were fined the monetary equivalent of all the raisins processed in their facility. Pet.App. 53a-54a. None of the fine was imposed on the other producers, who received full value for their crop.

On appeal, a USDA Judicial Officer ("JO") affirmed. Pet.App. 98a-99a, 122a-123a. As to Petitioners' takings claim, the JO claimed that he

had "no authority to judge the constitutionality of the various statutes administered by the United States Department of Agriculture." Pet.App. 78a; *but see United States v. Ruzicka*, 329 U.S. 287, 294 (1946) (challenges under the AMAA "formulated in constitutional terms ... in the first instance must be sought from the Secretary of Agriculture").

Of relevance here, the JO determined that, as "handlers," Petitioners violated 7 C.F.R. § 989.66 and § 989.166 by failing to hold reserve raisins for the 2002-2003 and 2003-2004 crop years. Pet.App. 97a-98a. The JO ordered Petitioners to pay $483,843.53, the dollar equivalent of the withheld raisins for the 2002-2003 (634,427 pounds) and 2003-2004 (611,159 pounds) crop years, as determined by the "field price" typically paid to producers for free-tonnage raisins in those years (hereafter, the "dollar equivalent" component of the fine). Pet.App. 109a-110a, 123a; 7 C.F.R. § 989.54(b). The JO also ordered Petitioners to pay an additional $202,600 in civil penalties pursuant to 7 U.S.C. § 608c(14)(B), $177,600 of which was imposed for failure to comply with the reserve requirement (hereafter, the "penalty" component of the fine). Pet.App. 98a, 122a. The remaining $25,000 is not at issue in this petition. Finally, the JO imposed an additional $8,783.39 in unpaid assessments pursuant to 7 C.F.R. § 989.80(a), which also are not at issue here. Pet.App. 112a, 123a.

It is important to emphasize that Petitioners bore the entirety of both the dollar equivalent and penalty components of the fine, and that the fine covered both Petitioners' own raisins and those allegedly "acquired" from their neighbors who used

Petitioners' equipment. The other producers received full market value for their crop and were not charged any part of the fine.

Petitioners sought review of the agency decision in the United States District Court for the Eastern District of California under Section 608c(14)(B). They contended, *inter alia*, that the requirement that they contribute a portion of their raisin crop to the government is an unconstitutional taking. The District Court granted summary judgment for the USDA. Pet.App. 189a-190a.

Petitioners appealed. On July 25, 2011, a panel of the Ninth Circuit affirmed the judgment in its entirety, holding that no taking occurs under the regulatory scheme — and no compensation is required — when "the Raisin Marketing Order applies to the Hornes only insofar as they voluntarily choose to send their raisins into the stream of interstate commerce." Pet.App. 208a. After Petitioners filed a rehearing petition, the government argued — for the first time — that the court lacked jurisdiction over the takings issue. On March 12, 2012, the panel filed a substitute opinion dismissing Petitioners' claims for lack of jurisdiction. Pet.App. 236a, 241a.

The Hornes petitioned this Court for certiorari, which this Court granted. On June 10, 2013, this Court unanimously reversed the Ninth Circuit and remanded for the Ninth Circuit to reconsider Petitioners' arguments on the merits. The panel ordered supplemental briefing addressing the Supreme Court's opinion and relevant new authority, and heard argument, but on May 9, 2014 it issued a

third opinion affirming the district court, once again on the merits.

The panel first considered whether the Raisin Marketing Order effects a per se taking of Petitioners' property for which just compensation is categorically required. It held that the Order did not do so, for two reasons: (1) because the per se takings rule applicable when the government takes possession of property extends only to *real* property and does not "govern controversies involving personal property" such as raisins, Pet.App. 20a, and (2) because "the Hornes did not lose all economically valuable use of their personal property," retaining benefit flowing from use of the raisins by the RAC and a contingent right to the proceeds set by the RAC. Pet.App. 20a-21a.

Rather than applying a per se takings analysis, the panel explicitly treated the Raisin Marketing Order as a restriction on the Hornes' use of their raisins in commerce and considered whether the Raisin Marketing Order satisfied the "'nexus and rough proportionality'" rule applied to land-use exactions under this Court's decisions in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Pet.App. 22a-23a. The Court found that it did, holding that there is "a sufficient nexus between the means and ends of the Marketing Order" and that "[t]he structure of the reserve requirement is at least roughly proportional ... to Congress's stated goal of ensuring an orderly domestic raisin market." Pet App. 29a. The panel therefore concluded that the Raisin Marketing Order "do[es] not constitute a taking under the Fifth Amendment." Pet.App. 29a.

According to the panel, "it is to Congress and the Department of Agriculture to which the Hornes must address their complaints." Pet.App. 29a.

This petition follows.

REASONS FOR GRANTING THE WRIT

The core protection of the Takings Clause is the categorical rule that private property is shielded from government *acquisition* without just compensation. When the government "takes possession" of property, it must pay the owner — full stop. *See Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012); *United States v. Pewee Coal Co.*, 341 U.S. 114, 116-17 (1951).

The Raisin Marketing Order, because it mandates a transfer of ownership of raisins from growers and handlers to the federal government's designee without payment of fair market value, obviously violates that rule. By the same token, as this Court recently reaffirmed, so do the dollar equivalent and penalty components of the fine imposed on Petitioners. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2600 (2013) (explaining that there is a per se taking "when the government commands the relinquishment of funds linked to a specific, identifiable property"); *Missouri Pac. Ry. Co. v. Nebraska*, 217 U.S. 196, 205-08 (1910) (holding that fines for refusal to submit to unconstitutional takings may be challenged under the Takings Clause); *Village of Norwood v. Baker*, 172 U.S. 269, 293 (1898) (holding that governmental assessment of monetary value of property that the government sought to take is itself a taking). The contortions the panel undertook in order to avoid treating the Raisin Marketing Order as a categorical taking violate

settled law; set the Ninth Circuit at odds with other federal courts; and work a fundamental injustice that threatens to devastate not only Petitioners, but all manner of United States property owners.

The panel's holding rests on three fundamental misinterpretations of the Takings Clause. *First*, contrary to this Court's own cases and the holdings of at least five courts of appeals, the panel held that per se physical takings are limited to real property and not to personal property. *See, e.g.*, *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) (applying Takings Clause to money earned as interest on an interpleader fund). *Second*, the panel held that the Hornes had not suffered a per se taking because they benefit from the Raisin Marketing Order and retain a theoretical right to any residual proceeds of the reserve raisins (even if they were zero). In effect, the panel held that by providing *less* than just compensation to a property owner, the government can avoid the per se compensation rule altogether. *Third*, the panel treated the government's taking of title to the reserve-tonnage raisins as a mere restriction on the Hornes' use of the raisins in commerce, directly contradicting this Court's explicit holding, reaffirmed recently in *Koontz*, that a seizure of ownership can never be justified in such terms. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 n.17 (1982); *see also Koontz*, 133 S. Ct. at 2594-95 ("Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them."); *Webb's*, 449 U.S. at 163 (a "forced contribution to general government revenues" is more than a mere restriction on use).

Each of these errors has the effect of converting forced transfer of property ownership to the government into something less: a mere regulatory act, subject only to a weak balancing test. Under the panel's reasoning, the government could structure virtually any taking — even an explicit confiscation of title and possession — as uncompensable regulation, effectively eviscerating the per se takings rule that has protected property rights in the United States for centuries. This Court must not allow that to remain the law without review. In light of the panel's errors, and its disturbing implications for property rights, this Court should grant the petition for certiorari.

I. THE NINTH CIRCUIT ERRED IN HOLDING THAT THE CATEGORICAL REQUIREMENT OF JUST COMPENSATION FOR PROPERTY EXPROPRIATED BY THE GOVERNMENT DOES NOT APPLY TO PERSONAL PROPERTY.

The first reason the panel provided for avoiding application of the categorical taking doctrine was that the categorical rule does not apply to "controversies involving personal property," such as raisins, but only to real property, Pet.App. 20a, *even when the government takes possession of personal property for itself*. The government must, in other words, pay just compensation for a seizure of one's house, but it can take away one's car, furniture, refrigerator, books, silver, and clothes subject only to balancing tests applicable to regulatory takings. *See, e.g., Penn Cent. Transp. Co. v. City of New York*, 438

U.S. 104 (1978). For all of that property, the central bulwark of the Fifth Amendment is gone.

Neither in its merits briefing nor its supplemental briefing below did the government argue such a position. It is not clear whether the government endorses this part of the court's holding, which contradicts longstanding practice of the federal government. At any rate, the notion that personal property may be expropriated without compensation conflicts with the precedents of this Court and other federal circuits, and marks a complete departure from how the Takings Clause has been understood for centuries.

A. The Panel's Decision Splits From This Court's Cases And Multiple Federal Circuits.

In holding that government appropriation of personal property is never categorically subject to the Takings Clause's just-compensation requirement, the panel contradicted a long line of this Court's cases holding that government confiscation of personal property constitutes a per se taking just as surely as taking possession of real property. This Court has, for example, categorically required compensation for taking "fixtures," including removable "trade fixtures," on the ground that "[a]n owner's rights in these are no less property within the meaning of the Fifth Amendment than his rights in land and the structures thereon erected." *United States v. Gen. Motors Corp.*, 323 U.S. 373, 383-84 (1945) (discussing taking from a tenant); *United States v. Burnison*, 339 U.S. 87, 93 n.14 (1950) ("An authorized declaration of taking or a requisition will put realty *or personalty* at the disposal of the United

States for 'just compensation.'") (emphasis added). Many other cases decided before the modern regulatory takings regime existed at all applied categorical takings rules to personal property, and even to intangible property such as intellectual property rights. *See United States v. Russell*, 80 U.S. 623, 628 (1871) (federal seizure of use of steamboats during the Civil War); *United States v. Palmer*, 128 U.S. 262, 271 (1888) (federal use of a patent); 2-5 Nichols on Eminent Domain § 5.03(5)(d) (Matthew Bender, 3d ed.) ("Compensation must be paid to all owners who have had their tangible personal property taken as a result of eminent domain."). This Court has never, to Petitioners' knowledge, distinguished between real and personal property in situations where the government seizes ownership.

More recently, this Court has applied the per se taking rule when the government seizes fungible personal property such as money. In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, this Court applied a per se analysis to appropriation of interest in an interpleader fund. 449 U.S. 155 (1980). As the Court explained, "a State, by *ipse dixit*, may not transform private property into public property without compensation." *Id.* at 164. Even a bondholder's contractual rights "are a form of property and as such may be taken for a public purpose *provided that just compensation is paid*," *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 19 n.16 (1977) (emphasis added), as is the intangible "going-concern value" of a business, *see Kimball Laundry Co. v. United States*, 338 U.S. 1, 10 (1949).

This Court recently made the same point in a slightly different way in *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586, 2598-99 (2013). In that decision, the Court addressed the question of whether a taking of money could constitute the kind of per se taking that triggers application of land-use exaction analysis. The Court held that it could: "[W]hen the government commands the relinquishment of funds linked to a specific, identifiable property interest ... , a 'per se takings approach' is the proper mode of analysis under the Court's precedent." 133 S. Ct. 2586, 2600 (2013) (alteration omitted) (citing *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 235 (2003)). This case falls precisely within that description.

The panel's decision also creates a circuit split with at least five federal circuits. In *Nixon v. United States*, the United States "argue[d] that the per se takings doctrine applies only to the physical occupation of real property," and so was inapplicable to the papers of President Richard Nixon. 978 F.2d 1269, 1284 (D.C. Cir. 1992). The court rejected that argument in no uncertain terms as "fail[ing] for want of authority or logic." *Id.* As the D.C. Circuit explained, "the actual holding of *Loretto* makes no mention of a distinction between real and personal property, nor was any rationale given in the opinion that might justify such a distinction." *Id.* Imposing a distinction between personal and real property "would be purely artificial," for "[o]ne may be just as permanently and completely dispossessed of personal property as of real property." *Id.* at 1285. Finding that a per se taking of the presidential papers had occurred, the court concluded that "the constitutional remedy of just compensation is required," and

remanded "for a determination of compensation due." *Id.* at 1287.

Other circuits have applied a per se takings rule in cases where the government takes ownership of property other than land. In *Cerajeski v. Zoeller*, the Seventh Circuit held that a State's "confiscation" of interest in a bank account was a taking for which compensation was categorically owed. 735 F.3d 577, 580, 583 (7th Cir. 2013). In reaching that conclusion, the court analogized the taking to a neighbor who occupies an apple orchard and physically takes the apples. *Id.* at 580; *see also Warner/Elektra/Atl. Corp. v. Cnty. of DuPage*, 991 F.2d 1280, 1285 (7th Cir. 1993) ("It is rare for American governments to requisition personal property, but sometimes they do so and when they do they have to pay just compensation."). Similarly, in *Anderson v. Spear*, the Sixth Circuit held that a law requiring political campaigns to turn over leftover contributions to the State after an election was a physical taking automatically requiring just compensation. 356 F.3d 651, 668-69 (6th Cir. 2004) (citing, *e.g.*, *Brown*, 538 U.S. 216). Decades ago, the Fifth Circuit applied a per se taking analysis to a federal appropriation of Lee Harvey Oswald's "personal effects," *Porter v. United States*, 473 F.2d 1329, 1331 (5th Cir. 1973), and the Tenth Circuit applied it to a taking of fish farmed on condemned land, *see United States v. Corbin*, 423 F.2d 821, 824 (10th Cir. 1970). *See also Philip Morris, Inc. v. Reilly*, 312 F.3d 24, 51 (1st Cir. 2002) (Selya, J., concurring in the judgment) ("Limiting per se takings analysis to cases involving real property is a crude boundary with no compelling basis in the law.").

The panel's decision to carve out exceptions to the per se taking rule when the government takes property other than real property brushes aside more than a century of this Court's jurisprudence, and creates an unbridgeable split among federal circuits. When it comes to actual appropriations of property, the kind of property involved — real or personal, tangible or intangible, fungible or infungible — has no significance; the Fifth Amendment's per se takings analysis protects them all.

B. The Panel's Decision Is Inconsistent With The History Of The Takings Clause.

A just-compensation requirement applicable to seizures of personal property was woven into the fabric of takings law long before the adoption of the Fifth Amendment. Even the Magna Charta provided that King could not "take grain or other chattels of any one without immediate payment." Magna Charta, ch. 28, *reprinted in* 1 Bernard Schwartz, *The Bill of Rights: A Documentary History* (1971). In the colonial era, Section 8 of the Massachusetts Body of Liberties (1641) protected personal property *alone* from uncompensated takings. *See* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 785 (1995).

Founding-era evidence demonstrates that protection for personal property was a *primary* purpose of the Takings Clause. The "founding generation" enacted the Takings Clause in large part because of their concern with "the appropriation of private property to supply the army during the Revolutionary War." Jed Rubenfeld, *Usings*, 102

Yale L.J. 1077, 1122 (1993); *see also* John Jay, *A Hint to the Legislature of the State of New York* (1778), *reprinted in* 5 *The Founders' Constitution* 312, 312-13 (Philip B. Kurland & Ralph Lerner eds., 1987). The first treatise on the United States Constitution, published in 1803, confirms that the Takings Clause was enacted in response to "the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practiced during the revolutionary war, without any compensation whatever." 1 Henry St. George Tucker, *Blackstone's Commentaries* app. at 305-06 (1803).

Aside from evidence of the Clause's purpose, there would have been no doubt at the time of adoption that the term "property" in the Takings Clause includes personal property. Samuel Johnson's dictionary defined property, most relevantly, as "[r]ight of possession," "[p]ossession held in one's own right," and [t]he *thing* possessed." 2 Samuel Johnson, *Dictionary of the English Language* (6th ed. 1785) (emphasis added). Noah Webster defined property as "[a]n estate, *whether in lands, goods or money*," and even included as examples of property "the productions of [one's] farm or ... shop[.]" Noah Webster, *American Dictionary of the English Language* (1828) (emphasis added). Shortly after the adoption of the Bill of Rights, James Madison likewise wrote that "a man's land, *or merchandize, or money* is called his property," and is entitled to various protection including that "none shall be taken directly even for public use without indemnification to the owner." James Madison, *Property* (1792), *reprinted in* 14 *The Papers of James*

Madison 266-68 (R. Rutland ed., 1977) (emphasis added; second emphasis omitted).

Subsequent commentators concurred that the protection against uncompensated appropriations of property — the only type of taking recognized before the development of regulatory takings doctrine — applied to all types of property, including personal property. "In regard to personal property, no question can ordinarily arise. It is seldom necessary to appropriate it, but if appropriated, it is *taken*[.]" John Lewis, *A Treatise on the Law of Eminent Domain in the United States* § 53 (2d ed. 1900). Likewise Thomas Cooley, who wrote in his influential treatise that "[t]he property which the Constitution protects is *anything of value which the law recognizes as such.*" Thomas M. Cooley, *General Principles of Constitutional Law in the United States of America* 336 (1880) (emphasis added).

The inescapable conclusion is that the panel's exclusion of personal property from the Takings Clause's protection against uncompensated appropriations abandons the Clause's historical moorings.

C. The Panel's Rationale Misconstrues *Loretto* And *Lucas*.

The Ninth Circuit did not acknowledge *any* of this history or contrary authority in concluding that the government's acquisition of title to personal property is not a per se physical taking. Instead, the panel tried to evade all of it simply by distinguishing *Loretto* — as if the per se rule for physical takings were a function of that case alone. *See* Pet.App. 20a. Needless to say, distinguishing *Loretto* does not dispose of the rule. And even on the panel's own

reasoning, there is no escaping the fact that the rule applies just as fully to personal property as to any other kind of property.

Although *Loretto* happened to involve real property, neither its holding nor its reasoning was so limited. *See Nixon*, 978 F.2d at 1284. What the *Loretto* Court actually said was that "when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred." 458 U.S. at 426. In portions of its opinion ignored by the panel below, the Court left no question that governmental confiscation of personal property is a classical taking as well. Quoting one scholar who had "accurately summarized the case law concerning the role of the concept of physical invasions in the development of takings jurisprudence," the Court agreed that "'one incontestable case for compensation ... seems to occur when the government deliberately brings it about that its agents, or the public at large, 'regularly' use, or 'permanently' occupy, space *or a thing* which theretofore was understood to be under private ownership.'" *Id.* at 427 n.5 (emphasis added) (quoting Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1184 (1967)).

The panel attempted to distinguish *Loretto* in various ways, none of them even passably convincing. One was that most (though not all) of the *Loretto* Court's precedents involved real property. Pet.App. 20a; *but see Loretto*, 458 U.S. at 435 (citing *General Motors*, 323 U.S. 373). True, but irrelevant; many per se takings cases before and since *Loretto*

involved personal property. Nor does it matter that the *Loretto* Court also pointed out that physical occupations are subject to "relatively few problems of proof." Pet.App. 20a (quoting *Loretto*, 458 U.S. at 437). An appropriation of personal property is not subject to serious factual disputes either, *see* Lewis, *Eminent Domain* § 53 ("In regard to personal property, no question can ordinarily arise."), least of all here, where a transfer of title is required by regulation. This Court has found effective government possession of property where proof is much harder. *E.g.*, *United States v. Causby*, 328 U.S. 256 (1946) (per se taking caused by airplane overflights). According to the panel, *Loretto*'s citation of "[t]he placement of a fixed structure on land or real property" as an "example" of a per se taking demonstrates that the case has a "narrow reach" that does not "extend" to personal property. Pet.App. 20a (emphasis omitted). But it can hardly be that when this Court illustrates its holding with an example, it impliedly excludes other possible examples.[1]

Nor does the panel's reliance on this Court's references to personal property in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992),

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[1] The panel also cited *Washington Legal Foundation v. Legal Foundation of Washington*, 271 F.3d 835, 854 (9th Cir. 2001) (en banc), for the proposition that "[t]he per se analysis has not typically been employed outside the context of real property," overlooking that this Court, in reviewing the Ninth Circuit's decision in that case, stated that a per se analysis was appropriate for money, the form of personal property at issue. *Brown*, 538 U.S. at 235.

support its conclusion. *Lucas* was a *regulatory* takings case, meaning that it involved a restriction on use of property rather than an acquisition of ownership. Its contribution to this Court's takings jurisprudence was to make clear that a taking occurs not only in cases of "physical invasion," but *also* "where regulation denies all economically beneficial or productive use of land" — in other words, that certain land-use regulations are treated *like* physical invasions. *Id.* at 1016. It may well be that this special rule for regulatory takings rarely applies to personal property, even when such property loses all value. *Id.* at 1027-28. But it hardly follows that the classical case of per se takings should be limited to real property simply because a category of regulatory takings usually is. On the contrary, it is surpassingly strange to interpret a case expanding protections against regulatory takings as *sub silentio* gutting the Takings Clause's core protection against uncompensated takings of ownership of property.

Interpreting *Lucas* to limit the scope of the per se rule for physical takings also contradicts this Court's rule that physical and regulatory takings doctrines are separate. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005). In fact, this Court has explained that it is "inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa." *Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 323-24 (2002). By applying *Lucas* to justify limiting *Loretto* to real property, the panel did exactly what this Court said it must not do.

The panel's reliance on *Lucas* also creates another split with other federal courts. At least two circuits have followed this Court's reasoning in *Tahoe-Sierra* that "[t]he lines of precedent for per se and regulatory takings are separate and distinct." *R & J Holding Co. v. Redevelopment Auth. of the Cnty. of Montgomery*, 670 F.3d 420, 431 (3d Cir. 2011); *Otay Mesa Prop., L.P. v. United States*, 670 F.3d 1358, 1365 & n.6 (Fed. Cir. 2012). The Ninth Circuit thus stands apart from other circuits in treating physical and regulatory takings doctrines as interchangeable.

II. THE NINTH CIRCUIT ERRED IN TREATING THE CONTINGENT POSSIBILITY OF LESS-THAN-JUST COMPENSATION, SET AT THE GOVERNMENT'S DISCRETION, AS A REASON NOT TO REQUIRE JUST COMPENSATION.

The panel's holding rests also on a second, independent misinterpretation of the Takings Clause. Not only did the panel hold that government appropriation of personal property is never a per se taking, but that appropriation of property — even of real property, evidently — is a per se taking *only* if it deprives the owner of "*all* rights associated with the [property]." Pet.App. 21a-22a. (emphasis added). Here, the panel reasoned, because the Hornes retained a theoretical right to residual proceeds of the reserve raisins (and an "equitable stake" in the benefits resulting from their confiscation, Pet.App. 21a), there was no per se taking. The government does not appear to have urged the panel to adopt that position, any more than the first.

In so holding, the panel confused, for a second time, the separate categories of physical and regulatory takings. The question whether a purported taking deprives the owner of all the property's valuable uses arises in the context of *regulatory* takings, where the property owner retains title. When a regulatory taking does so, it is treated *as if* the government had actually taken possession of the property. *See Lucas*, 505 U.S. at 1016. But that has no bearing on how a Court should treat a taking of actual ownership and possession. This Court has been explicit that in cases where the government takes possession of property, a court "*do[es] not ask* whether [the appropriation] deprives the owner of all economically valuable use[.]" *See Tahoe-Sierra*, 535 U.S. at 323 (emphasis added). If the government took one acre of a 100-acre parcel to build a post office, it could not avoid just compensation on the ground that it left the owner 99 of his acres. Nor could it avoid paying fair market value by reserving to the owner a contingent interest in the acre, worth less than fair market value (and maybe zero).

The panel's reasoning splits from Supreme Court and at least two federal circuit decisions making clear that even when the government "only partially impair[s]" ownership and possession of property, "in the physical taking jurisprudence *any* impairment is sufficient." *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1292 (Fed. Cir. 2008) (emphasis added) (per se taking for government diversion of water); *see also Gulf Power Co. v. United States*, 187 F.3d 1324, 1328 (11th Cir. 1999) (per se taking for requirement that electrical utilities allow telecommunications carriers access to their physical

networks). If a "partial impairment" of ownership triggers a categorical right to compensation, it cannot also be that, as the Ninth Circuit panel held, there is no categorical taking when some economically valuable interest in the property remains.

Loretto makes the same point. In *Loretto*, where the government required apartment building owners to permit installation of cable boxes, 458 U.S. at 422, an economically valuable use of the building remained. The specific property taken — rectangular areas of a building's exterior about the side of a breadbox — retained the obvious economically valuable use of sealing the building from the elements. Yet this Court held that the physical occupation of the property was a categorical taking requiring compensation nonetheless. *Id.* at 438 & n.16.

Besides conflicting with decisions of other courts, the panel's approach renders the just-compensation requirement incoherent. The panel did not reach the question of just compensation, and in fact specifically disclaimed any holding that Petitioners' interest in the reserve-tonnage raisins constituted just compensation. Pet.App. 22a n.16. In effect, the panel's holding means that the minimal-to-nonexistent financial compensation offered under the Marketing Order makes categorical takings rules inapplicable. That conflicts with the rule that the question of just compensation is independent from whether a particular kind of taking occurred. *See, e.g., Tahoe-Sierra*, 535 U.S. at 303 (existence of a regulatory taking is a "different and prior question" separate from compensation).

The effect of the panel's blurring of those questions is that by offering *inadequate* compensation for an assumption of ownership, a government can evade the categorical compensation requirement — and potentially avoid paying just compensation at all. If that is so, then the government has a roadmap for using procedural gamesmanship to escape per se takings rules and compensation requirements in nearly every case. Unlike the panel's first error, this rule sweeps across all types of property, real and personal alike, such that even if the government takes one's house, it is not categorically responsible for compensation so long as it offers a near-worthless IOU at the time it acts. If *that* is true, the Takings Clause's categorical takings rules are all but a dead letter, to be implicated only by acts by government agencies too unsophisticated to avoid them.

III. THE NINTH CIRCUIT CONTRADICTED THIS COURT AND SPLIT FROM OTHER CIRCUITS BY TREATING THE GOVERNMENT'S ACQUISITION OF THE RESERVE TONNAGE RAISINS AS A MERE CONDITION ON USE.

Rather than treat the government's acquisition of title to the reserve raisins as categorical taking, the panel did something unprecedented. It first "h[e]ld that the reserve requirement constitutes a use restriction on the Hornes' personal property[,] and then analogize[d] that use restriction to the land use permitting context." Pet.App. 22a-23a. Applying a "'nexus and rough proportionality'" test, Pet.App. 22a-23a, which this Court developed in the "special context" of land-use permitting, *Lingle*, 544 U.S. at

538, the panel determined that the Raisin Marketing Order does not effect a taking at all, Pet.App. 29a.[2] That analysis contradicts the law of this Court and the decisions of the Eleventh Circuit, Federal Circuit, and Oregon Supreme Court, all of which have rejected the argument that physical takings can be recast as use restrictions.

In holding that there was a physical taking in *Loretto*, this Court addressed the government's argument that installing facilities on private property was "simply a permissible regulation of the use of real property." 458 U.S. at 438-39. Justice Marshall flatly dismissed that assertion:

> It is true that the landlord could avoid the requirements of § 828 by ceasing to rent the building to tenants. But a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation. Teleprompter's broad "use-dependency" argument proves too much. For example, it would allow the

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[2] The panel asserted that the United States "urge[d]" that approach. Pet.App. 23a. That is not so. On the contrary, the United States argued at length in its Ninth Circuit supplemental brief that the land-use permitting test does *not* apply. *See* U.S. Supp. Br. 8 ("[T]he marketing order is not a land-use permit application process."); *id.* at 8-12 (discussing *Koontz*). The United States only suggested in the alternative, in a single paragraph, that the test would be satisfied *if it did* apply. *Id.* at 12. Once again, the panel's *sua sponte* use of yet another approach that no party recommended illustrates how far it stretched to protect the Raisin Marketing Order.

> government to require a landlord to devote a substantial portion of his building to vending and washing machines, with all profits to be retained by the owners of these services and with no compensation for the deprivation of space. It would even allow the government to requisition a certain number of apartments as permanent government offices. The right of a property owner to exclude a stranger's physical occupation of his land cannot be so easily manipulated.

Id. at 439 n.17.

This Court specifically reaffirmed that holding when evaluating use restrictions on land permits. In such cases, this Court "began with the premise that, had the government simply appropriated the easement in question, [it] would have been a per se physical taking" like *Loretto*. *Lingle*, 544 U.S. at 546 (discussing *Nollan* and *Dolan*); *see also Koontz*, 133 S. Ct. at 2594-95, 2598-99. To say that such an appropriation of land was "'a mere restriction on its use' is to use words in a manner that deprives them of all their ordinary meaning." *Nollan*, 483 U.S. at 831. As the Court reiterated just two Terms ago, when "the government commands the relinquishment of funds linked to a specific, identifiable property interest" — like the raisins here — "a per se takings approach is the proper mode of analysis under the Court's precedent." *Koontz*, 133 S. Ct. at 2600 (alteration and quotes omitted).

Following this Court's lead, the Eleventh Circuit, Federal Circuit, and Oregon Supreme Court have

refused to treat seizures of title as use restrictions. In *Gulf Power*, the Eleventh Circuit addressed a government requirement that utility companies provide telecommunications carriers and cable companies with access to their property. In holding that the requirement was a physical taking like the one in *Loretto*, the Eleventh Circuit rejected the argument that the mandatory-access provision is a permissible "regulatory condition" of use that the electric utilities could "avoid ... by refraining from using their poles, ducts, conduits, and rights-of-way for wire communications." 187 F.3d at 1331. As the court explained, that argument was "foreclosed by *Loretto*," which holds that "[t]he protection against a permanent, physical occupation of one's property does not hinge on the choice of use for that property." *Id.*

The Federal Circuit rejected the same argument in *Casitas Municipal Water District*. There, the government required a water-control project to physically and permanently divert a portion of the water it had beneficial use of so that the government could operate a "fish ladder" to preserve an endangered species. Concluding that this was a physical taking automatically requiring just compensation, the court rejected the government's argument that its requirement "was merely a use restriction on a natural resource, and therefore governed by the regulatory taking jurisprudence." 543 F.3d at 1293. The "restriction of use cases cited by the government" were simply inapplicable because "this case involves physical appropriation by the government." *Id.* at 1294. Like the Hornes' confiscated raisins, "[t]he water, and [the owner's] right to use that water, is forever gone." *Id.* at 1296.

Similarly, in *GTE Northwest, Inc. v. Public Utility Commission of Oregon*, the Oregon Supreme Court addressed a statute requiring certain telecommunications providers to allow other providers to install "equipment, software, and databases" on their property. 900 P.2d 495, 503 (Or. 1995) (internal quotation omitted). In holding that this was a physical taking requiring compensation, the court rejected the argument that "when the state has the power to forbid a particular use of property, it may, as the price of permitting that use, require the owner to submit to *a physical invasion* of that property as long as there is a substantial nexus between the governmental purpose and the invasion." *Id.* at 505. Applying *Loretto*, the court explained that the fact that "an industry is heavily regulated, and [] a property owner acquired the property knowing that it is heavily regulated, do[es] not diminish a physical invasion to something less than a taking." *Id.* at 504.

The panel thus confused seizure of ownership of property, imposed as a condition on engaging in business, with a mere limitation on property use. It may well be that if the USDA merely limited the amount of a crop that a farmer can sell, that would be a use restriction. But the Raisin Marketing Order is not of this description. As described by the Court of Claims in *Evans*, 74 Fed. Cl. at 558, "the raisin marketing order stands out from most of its counterparts" in that it requires handlers to "transfer title" over reserve raisins to the government, for the government's own use and sale.

The panel justified equating this physical transfer of raisins with a use restriction by citing *Wallace v.*

Hudson-Duncan & Co., 98 F.2d 985 (9th Cir. 1938), which long predates this Court's decisions in *Loretto*, *Nollan*, *Lingle*, and *Koontz* and does not survive them. The panel also analogized this case to ones involving *regulatory* takings. *See Yee v. City of Escondido*, 503 U.S. 519, 524-25 (1992) (rent control ordinance); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1006 (1984) (data confidentiality). That yet again collapses this Court's longstanding distinction between regulatory and physical takings. *See supra* p. 24-25.

In fact, *Yee* reaffirmed both *Loretto*'s holding and the *very language* that squarely contradicts the panel's holding. *See* 503 U.S. at 531-32 (quoting *Loretto*'s footnote 17 with approval). As *Yee* explained, "[h]ad the city required such [a physical] occupation, of course, petitioners would have a right to compensation, and the city might then lack the power to condition petitioners' ability to run mobile home parks on their waiver of this right." *Id.* at 532. And *Yee* reaffirmed that the government's categorical duty of just compensation when it "actually takes title" to property is "distinct" from its duty to compensate when it "merely regulates the use of property." *Id.* at 522; *see also GTE Nw.*, 900 P.2d at 505 (citing *Yee* for the premise that transfer of title is a physical taking entirely distinct from use restrictions like those in *Nollan* and *Dolan*).

The damage done by the panel's analytical confusion is already starting to spread to other courts, albeit thus far only in dictum. In *R & J Holding*, the Third Circuit discussed the district court and first panel decision in this case, expressing in *dicta* the view that the panel's use restriction

theory (which the panel has now resurrected) provided a "sound[] analytical framework." 670 F.3d at 431. With little analysis beyond citation to the Ninth Circuit decision, the Third Circuit approved in passing the panel's view that "in order to participate in the world of raisin marketing, growers must surrender a portion of their crop as an entrance fee." *Id.* It is important that this Court intervene before these analytical errors become established in the law of other circuits.

The panel sought to downplay the practical impact of its holding by noting that the Hornes "can avoid the reserve requirement of the Marketing Order by ... planting different crops, including other types of raisins, not subject to this Marketing Order or selling their grapes without drying them into raisins." Pet.App. 25a-26a. That is cold comfort to life-long raisin farmers who have every right to pursue their lawful calling without suffering expropriation of their crops.

It also obscures the true reach of the panel's holding that the government need not pay just compensation when it physically takes *some* portion of an owner's personal property in exchange for allowing the owner to use that property in commerce, just so long as the government does not take the *entire* property. There is no end of circumstances where the government could deprive property owners of "possessory and dispositional control," Pet.App. 23a n.18, 25a, subject only to analysis applicable to use restrictions rather than a categorical compensation requirement. *See, e.g.*, *Loretto*, 458 U.S. at 439 n.17 (rejecting the defendant's argument in part because "[i]t would even allow the

government to requisition a certain number of apartments as permanent government offices").

The panel's decision ultimately stands for the proposition that if the government allows us to do business, it can take our property as a condition. Not since the barons prevailed at Runnymede has that been the law.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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September 8, 2014

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARVIN D. HORNE AND LAURA R. HORNE, d.b.a. RAISIN VALLEY FARMS, A PARTNERSHIP, and d.b.a. RAISIN VALLEY FARMS MARKETING ASSOCIATION, a.k.a. RAISIN VALLEY MARKETING, an unincorporated association; MARVIN D. HORNE; LAURA R. HORNE; DON DURBAHN, and the ESTATE OF RENA DURBAHN, d.b.a. LASSEN VINEYARDS, a partnership, *Plaintiffs-Appellants,* v. UNITED STATES DEPARTMENT OF AGRICULTURE, *Defendant-Appellee.*	No. 10-15270 D.C. No. 1:08-cv-01569-LJO-SMS OPINION

Appeal from the United States District Court
for the Eastern District of California
Lawrence J. O'Neill, District Judge, Presiding

Argued and Submitted
February 14, 2014—San Francisco, California

Filed May 9, 2014

Before: Stephen Reinhardt, Michael Daly Hawkins, and Ronald M. Gould, Circuit Judges.

Opinion by Judge Hawkins

COUNSEL

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Stuart F. Delery, Acting Assistant Attorney General, Joshua Waldman (argued) and Michael S. Raab, Attorneys, Appellate Staff, Civil Division, United States Department of Justice, Washington, D.C.; Benjamin B. Wagner, United States Attorney, and Benjamin E. Hall, Assistant United States Attorney, Fresno, California, for Defendant-Appellee.

OPINION

HAWKINS, Senior Circuit Judge:

To ensure stable market conditions, the Secretary of Agriculture, administering a complex regulatory program, requires California producers of certain raisins to divert a percentage of their annual crop to a reserve. The percentage of raisins diverted to the reserve varies annually according to that year's crop output. Subject to administrative and judicial review, the Secretary can impose a penalty on producers who fail to comply with the diversion program. The program's goal is to keep raisin supply relatively constant from year to year, smoothing the raisin supply curve and thus bringing predictability to the market for producers and consumers alike. The diverted raisins are sold, oftentimes in

noncompetitive markets, and raisin producers are entitled to a pro rata share of the sales proceeds less administrative costs. In some years, this "equitable distribution" is significant; in other years it is zero.

Eschewing any Commerce Clause or regulatory takings theory, Plaintiffs-Appellants Marvin and Laura Horne ("the Hornes") challenge this regulatory program and, in particular, the Secretary's ability to impose a penalty for non-compliance, as running afoul of the Takings Clause of the Fifth Amendment.[1] Specifically, the Hornes argue Defendant-Appellee the Department of Agriculture ("the Secretary"), charged with overseeing the diversion program, works a constitutional taking by depriving raisin producers of their personal property, the diverted raisins, without just compensation. The Secretary defends the constitutionality of the reserve requirement. Concluding the diversion program does not work a constitutional taking on the theory advanced by the Hornes, we affirm the judgment of the district court.[2]

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[1] Collectively referred to as "the Hornes," the Plaintiffs-Appellants are Marvin and Laura Horne, d/b/a Raisin Valley Farms (a California general partnership), and d/b/a Raisin Valley Farms Marketing Association (a California unincorporated association), together with their business partners Don Durbahn and the Estate of Rena Durbahn, collectively d/b/a Lassen Vineyards (a California general partnership).

[2] In doing so, we note the Court of Federal Claims has also upheld the constitutionality of this regulatory program. *See Evans v. United States*, 74 Fed. Cl. 554, 558 (2006), *aff'd*, 250 F. App'x. 321 (Fed. Cir. 2007) (unpub.).

FACTUAL AND PROCEDURAL BACKGROUND

A

Raisin prices rose rapidly between 1914 and 1920, peaking in 1921 at $235 per ton. This surge in prices spurred increased production, which in turn caused prices to plummet back down to between $40 and $60 per ton, even while production continued to expand. As a result of this growing disparity between increasing production and decreasing prices, the industry became "compelled to sell at less than parity prices and in some years at prices regarded by students of the industry as less than the cost of production." *Parker v. Brown*, 317 U.S. 341, 364 (1943); *see id.* at 363–64 & nn.9–10; *see also Zuber v. Allen*, 396 U.S. 168, 174–76 (1969) (describing market conditions). *See generally Daniel Bensing, The Promulgation of Implementation of Federal Marketing Orders Regulating Fruit and Vegetable Crops Under the Agricultural Marketing Agreement Act of 1937*, 5 San Joaquin Agric. L. Rev. 3 (1995) (describing the history of the AMAA and the structure of the regulatory program it authorizes).

This market upheaval pervaded the entire agriculture industry, prompting Congress to enact the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. § 601 *et seq.* ("AMAA"), to bring consistency and predictability to the Nation's agricultural markets. Pursuant to the AMAA, the Department of Agriculture implemented the Marketing Order Regulating the Handling of Raisins Produced from Grapes Grown in California, 7 C.F.R. Part 989 ("Marketing Order"), in 1949 in direct response to the market conditions described in *Parker*.

The Marketing Order ensures "orderly" market conditions by regulating raisin supply. 7 U.S.C. § 602(1). The Secretary has delegated to the Raisin Administrative Committee ("RAC") the authority to set an annual "reserve tonnage" requirement, which is expressed as a percentage of the overall crop.[3] *See* 7 C.F.R. §§ 989.65–66. The remaining raisins are "free tonnage" and can be sold on the open market. The reserved raisins are diverted from the market to smooth the peaks of the raisin supply curve. *Id.* at § 989.67(a). To smooth the supply curve's valleys, reserved raisins are released when supply is low. By varying the reserve requirement annually, the RAC can adapt the program to address changing growing and market conditions. For example, in the 2002–03 and 2003–04 crop years at issue here, the reserve percentages were set at forty-seven percent and thirty percent of the annual crop, respectively.

The operation of the Marketing Order turns on a distinction between "producers" and "handlers." A "producer" is a "person engaged in a proprietary capacity in the production of grapes which are sun-dried or dehydrated by artificial means until they become raisins . . ." 7 C.F.R. § 989.11. By contrast, included in the definition of a "handler," *id.* at 989.15, is any person who "stems, sorts, cleans, or seeds raisins, grades stemmed raisins, or packages

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[3] The RAC is currently comprised of forty-seven industry-nominated representatives appointed by the Secretary, of whom thirty-five represent producers, ten represent handlers, one represents the cooperative bargaining association, and one represents the public. *See* 7 C.F.R. §§ 989.26, 989.29, and 989.30.

raisins for market as raisins," *id.* at 989.14.[4] Raisin producers convey their entire crop to a handler, receiving a pre-negotiated field price for the free tonnage. *Id.* at § 989.65. Handlers, who sell free tonnage raisins on the open market, bear the obligation of complying with the Marketing Order by diverting the required percentage of each producer's raisins to "the account of the [RAC]." *Id.* § 989.66(a). Handlers must also prepare the reserved raisins for market, and the RAC compensates them for providing this service. *Id.* at § 989.66(f).

The RAC tracks how many raisins each producer contributes to the reserve pool. When selling the raisins, the RAC has a regulatory duty to sell them in a way that "maxim[izes] producer returns." *Id.* at § 989.67(d)(1). The RAC, which receives no federal funding, finances its operations and the disposition of reserve raisins from the proceeds of the reserve raisin sales. Whatever net income remains is disbursed to producers, who retain a limited equity interest in the RAC's net income derived from reserved raisins. *See* 7 U.S.C. § 608c(6)(E); 7 C.F.R. § 989.66(h).

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[4] Specifically, any person who "stems, sorts, cleans, or seeds raisins, grades stemmed raisins, or packages raisins for market as raisins" is a "packer" of raisins, and all packers are handlers. 7 C.F.R. §§ 989.14 & 989.15. These definitions apply only to activities taking place within "the area," which simply refers to the State of California. *Id.* at § 989.4.

Additionally, any producer who sorts and cleans his own raisins in their unstemmed form is not a packer with respect to those raisins. 7 C.F.R. § 989.14.

B

Dissatisfied with what they view as an out-dated regulatory regime, the Hornes set out to restructure their raisin operation such that the Marketing Order would not operate against them. Put another way, the Hornes came up with a non-traditional packing program which, in their view, the Secretary had no authority to regulate. Instead of sending their raisins to a traditional packer, against whom the reserve requirement of the Marketing Order would clearly operate, the Hornes purchased their own handling equipment to clean, stem, sort, and package raisins. The Hornes then performed the traditional functions of a handler with respect to the raisins they produced. The Hornes believed that, by cleaning, stemming, sorting, and packaging their own raisins, they would not be "handlers" with respect to the raisins they produced. In addition, the Hornes performed the same functions for a number of other producers for a per-pound fee. Similarly, by not acquiring title to the raisins of other producers but rather charging those producers a per-pound fee, the Hornes believed they did not fall within the regulatory definition of "handler" with respect to the third-party producers' raisins. With this set-up, the Hornes believed the requirements of the Marketing Order would not apply to them, relieving them of the obligation to reserve any raisins.[5]

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[5] The government contends the Hornes lack standing to assert a takings defense with respect to raisins they never owned, i.e., raisins produced by third parties. The government concedes the Hornes have standing to assert a takings defense with respect to raisins they produced themselves.

C

The Secretary disagreed with the Hornes and applied the Marketing Order to their operation with respect to the raisins grown both by the Hornes and by third-party producers. At the end of protracted administrative proceedings, a U.S.D.A. Judicial Officer found the Hornes liable for numerous regulatory violations and imposed a monetary penalty of $695,226.92.[6] The Hornes then sought review of that final agency action in federal district court pursuant to 7 U.S.C. § 608c(14)(B). In district court, the Hornes alleged they were not "handlers" within the meaning of the regulation and further alleged the agency's order violated the Takings

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We decline to decide what rights under California law a non-title holder has to challenge the "taking" of property in his possession. *See Vandevere v. Lloyd*, 644 F.3d 957, 963 (9th Cir. 2011) (holding that for the takings claim "whether a property right exists . is a question of state law") (emphasis omitted). Here, it is enough to note the Hornes clearly have standing to assert a taking defense with respect to the raisins they produced themselves, entitling them to a decision on the merits for at least that property. Because we rule against the Hornes on the merits, we need not further address the standing issue.

[6] The Judicial Officer ordered the Hornes to pay (1) $8,783.39 in overdue assessments for the 2002–03 and 2003–04 crop years, (2) $483,843.53 as the dollar equivalent for the raisins not held in reserve, and (3) $202,600 as a civil penalty for failure to comply with the Marketing Order. The overdue assessments in their entirety and $25,000 of the civil penalty were imposed for violations of the Marketing Order unrelated to the reserve requirement. *See, e.g.*, 7 C.F.R. § 989.73 (requiring handlers to file certain reports); *id.* at § 989.77 (requiring handlers to allow the Agricultural Marketing Service access to records). The balance of the penalty and assessments pertain directly to the Hornes' failure to reserve raisins.

Clause and the Eighth Amendment's prohibition against excessive fines. The district court granted summary judgment in favor of the Secretary on all counts. *See Horne v. U.S. Dep't of Agric.*, No. CV-F-08-1549 LJO SMS, 2009 WL 4895362 (E.D. Cal. filed Dec. 11, 2009).

The Hornes appealed to this court. We affirmed the district court with respect to the Hornes' statutory claims, holding that even if the AMAA's definitions of "handler" and "producer" are ambiguous, the Secretary's application of the Marketing Order to the Hornes was neither arbitrary nor capricious, and it was supported by substantial evidence. *Horne v. U.S. Dep't of Agric.*, 673 F.3d 1071, 1078 (9th Cir. 2011) ("Horne I"). We also affirmed the district court's grant of summary judgment in favor of the Secretary on the Eighth Amendment claim. *Id.* at 1080–82. And we held we lacked jurisdiction over the Fifth Amendment claim. Specifically, we held the Hornes brought their takings claim as producers rather than handlers. Because the AMAA did not in our view displace the Tucker Act with respect to a producer's claim, we held that jurisdiction over the takings claim fell with the Court of Federal Claims rather than the district court. *Id.* at 1078–80.

The Hornes sought and the Supreme Court granted certiorari with respect to the jurisdictional issue. Reversing our judgment on that issue alone, the Supreme Court held (1) the Hornes brought their takings claim as handlers, and (2) the Hornes, as handlers, may assert a constitutional defense to the underlying agency action in district court. *Horne v. Dep't of Agric.*, 133 S. Ct. 2053, 2061, 2062 (2013).

(The Supreme Court reserved the question of whether the Hornes could have sought relief in the Court of Federal Claims, instead holding only that handlers could obtain judicial review in district court. *Id.* at 1062 n.7.)[7] The Supreme Court remanded for a determination of the merits of the Hornes' takings claim, which, having received supplementary briefing and additional oral argument, we now decide.

STANDARD OF REVIEW

We review de novo a district court's grant of summary judgment in a case involving a constitutional challenge to a federal regulation. *Ariz. Life Coal., Inc. v. Stanton*, 515 F.3d 956, 962 (9th Cir. 2008); *Doe v. Rumsfeld*, 435 F.3d 980, 984 (9th Cir. 2006).

STANDING

The Secretary contends the Hornes lack standing to challenge the portion of the penalty attributable to the sale of any raisins produced by third-party firms, then handled by the Hornes (the "third-party raisins"). The Secretary argues the Hornes never

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[7] Because the Hornes' certiorari petition only challenged our disposition of the Hornes' Fifth Amendment claim, *Horne I* is the final judgment of the Hornes' Eighth Amendment and statutory claims. Accordingly, because the statutory claims are no longer at bar, the Hornes concede they no longer challenge the Judicial Officer's imposition of $8,783.39 in overdue assessments or the related $25,000 in civil penalties. The Hornes' challenge is confined to the remaining dollar value equivalent and its attendant civil penalty (hereinafter, "the penalty"), because these are directly traceable to the Hornes' failure to reserve raisins. *See supra* n.5.

owned these raisins and so cannot challenge their seizure.[8] We find this argument unpersuasive.

As the Supreme Court made clear, the injury suffered by the Hornes is not the obligation to reserve raisins for the RAC (which, of course, the Hornes did not do), but rather to pay the penalty imposed for the Hornes' failure to comply with the Marketing Order. *Horne*, 133 S. Ct. at 2061 n.4. Thus, the government's contention that the Hornes would not have standing to challenge a government seizure of the third-party raisins (a seizure which, of course, never happened) is irrelevant to the standing inquiry here.[9]

Instead, we analyze whether the Hornes have standing to challenge the penalty. A monetary penalty is an actual, concrete and particularized injury-in-fact. *Sacks v. Office of Foreign Assets Control*, 466 F.3d 764, 771 (9th Cir. 2006) (citing *Cent. Ariz. Water Conserv. Dist. v. EPA*, 990 F.2d

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[8] The Secretary concedes the Hornes have standing to challenge the remainder of the penalty.

[9] Additionally, we doubt the government's contention that the Hornes would lack standing to challenge a seizure of property they held in bailment. In an analogous situation, we have held that individuals lacking an ownership interest in a given piece of property have standing to challenge the seizure of that property. *See United States v. $191,910 in U.S. Currency*, 16 F.3d 1051, 1057 (9th Cir. 1994) ("In order to contest a forfeiture, a claimant need only have some type of property interest in the forfeited items. This interest need not be an ownership interest; it can be any type of interest, including a possessory interest."), *superseded on other grounds by statute as stated in United States v. $80,180.00*, 303 F.3d 1182, 1184 (9th Cir. 2002). In any event, because we hold the Hornes have established standing as the subjects of the penalty, we need not confront this question.

1531, 1537 (9th Cir. 2006)); *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The need to pay a penalty is obviously traceable to its imposition, and a favorable merits determination in this litigation would redress the Hornes' alleged injury, thereby satisfying the Lujan requirements. *See Lujan*, 504 U.S. at 560–61. We thus hold the Hornes have standing to bring this constitutional challenge.

CONSTITUTIONAL CLAIM

The Takings Clause does not prohibit the government from taking property for public use; rather, it requires the government to pay "just compensation" for any property it takes. U.S. Const. amend. V. Thus, a takings challenge follows a two-step inquiry. First, we must determine whether a "taking" has occurred; that is, whether the complained-of government action constitutes a "taking," thus triggering the requirements of the Fifth Amendment. If so, we move to the second step and ask if the government provided just compensation to the former property owner. *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 231–32, 235–36 (2003); *First English Evangelical Lutheran Church of Glendale v. Cnty. of L.A.*, 482 U.S. 304, 314 (1987).

However, before turning to the first step of this formula, we must address a threshold issue and identify precisely which property was allegedly taken from the Hornes.

A

The Hornes declined to comply with the reserve requirement of the Marketing Order; at no time did the Hornes, either as producers or as handlers, ever

physically convey raisins to the RAC. Instead, the Secretary imposed the penalty on the Hornes for their failure to comply with the Marketing Order. In general, the imposition and collection of penalties and fines does not run afoul of the Takings Clause. *See Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586, 2601 (2013) (listing cases). Here, however, the Hornes link the Secretary's imposition of a penalty to a specific governmental action they allege to be a taking. In effect, the Hornes argue the constitutionality of the penalty rises or falls with the constitutionality of the Marketing Order's reserve requirement.

We agree that the penalty cannot be analyzed without reference to the reserve requirement, and we find *Koontz* instructive on this point. In *Koontz*, a permitting agency refused to grant a developer a building permit until the developer funded offsite environmental impact mitigation works. 133 S. Ct. at 2593. The developer sued, arguing the permitting agency's conditions for obtaining a permit violated the "nexus and rough proportionality" rule of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).[10] The Supreme Court of Florida declined to apply *Nollan* and *Dolan*, because in those cases the permitting agencies granted the relevant permit subject to a condition subsequent. The Florida court did not believe *Nollan* and *Dolan* would apply to situations in which the permitting agency refused to issue a permit until the permittee met a condition precedent. The Supreme Court reversed, holding the

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[10] We discuss *Nollan* and *Dolan* in more detail in Section D.

distinction between conditions precedent and subsequent constitutionally irrelevant in this context. *See id.* at 2596.

Relevant to this case, *Koontz* confronts the issue of how to analyze a takings claim when a "monetary exaction," rather than a specific piece of property, is the subject of that claim. *Koontz* distinguished *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1988), by noting that in *Koontz*, "unlike *Eastern Enterprises*, the monetary obligation burdened petitioner's ownership of a specific parcel of land." *Koontz*, 133 S. Ct. at 2599; *accord id.* at 2600 ("The fulcrum this case turns on is the direct link between the government's demand and a specific parcel of real property."). This direct linkage between the monetary exaction and the piece of land guided the Court to invoke the substantive takings jurisprudence relevant to the *land* for the purpose of determining whether the related *monetary exaction* constituted a taking. *Id.*

Here, the Secretary specifically linked a monetary exaction (the penalty imposed for failure to comply with the Marketing Order) to specific property (the reserved raisins). The Hornes faced a choice: relinquish the raisins to the RAC or face the imposition of a penalty. There is no question the monetary exaction is linked to specific property because the Judicial Officer's order requires the Hornes to repay the market value of the unreserved raisins (plus an additional penalty for non-compliance). Because the Marketing Order is structured in this way, we follow *Koontz* to analyze the constitutionality of the penalty imposed on the Hornes against the backdrop of the reserve

requirement. If the Secretary works a constitutional taking by accepting (through the RAC) reserved raisins, then, under the unconstitutional conditions doctrine, the Secretary cannot lawfully impose a penalty for non-compliance. But if the receipt of reserved raisins does not violate the Constitution, neither does imposition of the penalty. *See id.* at 2596 (discussing the unconstitutional conditions doctrine).[11]

B

We return to the task of determining whether the imposition of the penalty for failure to comply with the reserve requirement constitutes a taking. A "paradigmatic taking" occurs when the government appropriates or occupies private property. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005). *Lingle* gives as an example of this sort of taking the government's wartime seizure of a coal mine. *Id.*; *see United States v. Pewee Coal Co.*, 341 U.S. 114, 115–16 (1951). Because the government neither seized any raisins from the Hornes' land nor removed any money from the Hornes' bank account, the Hornes cannot—and do not—argue they suffered this sort of "paradigmatic taking."

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[11] Contrary to the Hornes' suggestion, however, we read *Koontz* only to say this much. The Hornes argue *Koontz* somehow substantively altered the doctrinal landscape against which we evaluate takings claims. We disagree. *Koontz* simply clarifies the range of takings cases in which *Nollan* and *Dolan* provide the rule of decision. See 133 S. Ct. at 2598 (declining to address merits of petitioner's claim under *Nollan* and *Dolan*); *id.* at 2602–03 (declining to alter or overrule the holdings of *Nollan* and *Dolan*).

Instead, we must enter the doctrinal thicket of the Supreme Court's regulatory takings jurisprudence. Since *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1945), the Court has recognized that "government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster—and that such 'regulatory takings' may be compensable . . . ." *Lingle*, 544 U.S. at 538. In general, regulatory takings are analyzed under the ad hoc framework announced in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). The Hornes, however, have intentionally declined to pursue a *Penn Central* claim. Instead, they argue the Marketing Order, though a regulation, works a categorical taking.[12]

Since *Mahon*, the Supreme Court has identified three "relatively narrow categories" of regulations which work a categorical, or per se, taking. Each category has a paradigmatic or representative case. *Lingle*, 544 U.S. at 538.[13] The representative case of the first category, *Loretto v. Teleprompter Manhattan*

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[12] Similarly, the Hornes concede the AMAA and Marketing Order fall within Congress's Commerce Clause authority. However, that a governmental action is authorized by the Commerce Clause does not immunize it from the requirements of the Takings Clause. *Lingle*, 544 U.S. at 543; *Kaiser Aetna v. United States*, 444 U.S. 164, 172 (1979).

[13] We read *Lingle* to elevate the land use exaction cases to a third category on par with permanent physical invasions and complete economic deprivation regulations. 544 U.S. at 538 ("Outside these two categories (*and* the special context of land-use exactions discussed below), regulatory takings challenges are governed by *Penn Central Transp. Co. v. New York City*.") (citation omitted and emphasis added).

CATV Corp., 458 U.S. 419, 427–38 (1982), holds that permanent physical invasions of real property work a per se taking. The second, represented by *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992), teaches that regulations depriving owners of all economically beneficial use of their real property also work a per se taking. The third line of cases, represented by *Nollan* and *Dolan*, articulate a more nuanced rule. Together, *Nollan* and *Dolan* hold that a condition on the grant of a land use permit requiring the forfeiture of a property right constitutes a taking *unless* the condition (1) bears a sufficient nexus with and (2) is roughly proportional to the specific interest the government seeks to protect through the permitting process. If those two conditions are met, then the imposition of the conditional exaction is not a taking.

We must determine which analytical framework provides the proper point of departure for our inquiry into whether a taking has occurred here. The Hornes see a direct analogy between *Loretto's* occupation of land for the purpose of installing an antenna and the Marketing Order's reserve requirement. The Secretary argues *Nollan* and *Dolan* provide better guidance to evaluate the constitutionality of what the Secretary characterizes as a use restriction on raisins. We must first identify which of the categorical takings case lines, if any, the Marketing Order implicates. Second, we must apply that case line's substantive law to determine whether a taking has occurred.

C

Loretto applies only to a total, permanent physical invasion of real property. Two independent reasons

assure us that the Marketing Order does not fall within the "very narrow" scope of the *Loretto* rule, 458 U.S. at 441: First, the Marketing Order operates on personal, rather than real property, and second, the Marketing Order is carefully crafted to ensure the Hornes are not completely divested of their property rights, even with respect to the reserved raisins.

1

The Marketing Order operates against personal, rather than real, property. Because the Takings Clause undoubtedly protects personal property, *see Phillips v. Wash. Legal Found.*, 524 U.S. 156, 172 (1998) (interest earned on lawyers' trust account is a protected private property); *Brown*, 538 U.S. at 235 (same); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001–04 (1984) (same for trade secrets), this distinction does not mean the Takings Clause is inapplicable. But, as the Supreme Court stated in *Lucas*, the Takings Clause affords less protection to personal than to real property:

> [O]ur "takings" jurisprudence . . . has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; as long recognized, some values are enjoyed under an implied

> limitation and must yield to the police power. And in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale). In the case of land, however, we think the notion pressed by the Council that title is somehow held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.

Lucas, 505 U.S. at 1027–28.

Lucas uses comparative language to make clear the Takings Clause affords more protection to real than to personal property. While the precise contours of these differing levels of protection are not entirely sharp, *Lucas* suggests the government's authority to regulate such property without working a taking is at its apex where, as here, the relevant governmental program operates against personal property and is motivated by economic, or "commercial," concerns. Indeed, it is clear the holding of *Lucas* is limited to cases involving land. The sentence which rejects the State's contention that "the State may subsequently eliminate all economically valuable use" of the *Lucas*'s property

begins with the phrase "[i]n the case of land" and is expressly contrasted against commercial personal property, over which the government exerts a "traditionally high degree of control." *Id.* at 1028.

The real/personal property distinction also undergirds *Loretto*. Justifying its bright-line rule, *Loretto* states "whether a permanent physical occupation has occurred presents relatively few problems of proof. The placement of a fixed structure on *land or real property* is an obvious fact that will rarely be subject to dispute." 458 U.S. at 437 (emphasis added). This example underscores the narrow reach of *Loretto*. In reaching its decision, the Court discussed the evolution of its takings jurisprudence, citing virtually only cases pertaining to real property. *See id.* at 427–37. And because the case unquestionably (and solely) concerned real property, the *Loretto* Court did not have occasion to consider the occupation of personal property. Given the Court's later discussion of personal property in *Lucas*, we see no reason to extend *Loretto* to govern controversies involving personal property. *See also Wash. Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835, 854 (9th Cir. 2001) (en banc), *aff'd sub nom., Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003) ("The per se analysis has not typically been employed outside the context of real property. It is a particularly inapt analysis when the property in question is money.").

2

Equally importantly, the Hornes did not lose all economically valuable use of their personal property. Unlike *Loretto*, which applies only when *each* "'strand' from the 'bundle' of property rights" is

"chop[ped] through . taking a slice of every strand," 458 U.S. at 435, the Hornes' rights with respect to the reserved raisins are not extinguished because the Hornes retain the right to the proceeds from their sale. *See* 7 U.S.C. § 608c(6)(E); 7 C.F.R. § 989.66(h). The Hornes essentially call this right meaningless because the equitable distribution may be zero.[14] But, the equitable distribution is not zero in every year, and even in years with a zero distribution, there are gross proceeds from the sale of the reserved raisins; it just so happens that in those years, those gross proceeds are not greater than the operating expenses of the RAC.

Here, we pause to focus on the RAC's structure and purpose, as well as the benefits it secures for producers such as the Hornes. The RAC is governed by industry representatives including producers and handlers.[15] Its purpose is to stabilize market conditions for raisin producers. Thus, the Hornes' equitable stake in the reserved raisins, even in years in which they are not entitled to a cash distribution from the RAC, funds the administration of an industry committee tasked with (1) representing raisin producers, such as the Hornes, and (2) implementing the reserve requirement, the effect of which is to stabilize the field price of raisins. In light

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[14] The parties dispute whether there was a distribution for the crop years in question and, if so, the value of that distribution. We do not consider this dispute material to the question of whether a taking occurred because the distribution reflects net revenue. For the reasons we give, we focus on the gross revenue generated by the reserve raisin pool.

[15] In fact, Mr. Horne has been an alternate member, though never a voting member, of the RAC.

of this scheme, the Hornes cannot claim they lose all rights associated with the reserve raisins. Indeed, the structure of the diversion program ensures the reserved raisins continue to work to the Hornes' benefit after they are diverted to the RAC, even in years in which producers receive no equitable distribution of the RAC's net profits.[16]

For these reasons, the Hornes' reliance on *Loretto* is unavailing. *Loretto* specifically preserves the state's "substantial authority" and "broad power to impose appropriate restrictions upon an owner's use of his property." 458 U.S. at 441. Here, the reserved raisins are not permanently occupied; rather, their disposition, while tightly controlled, inures to the Hornes' benefit. Coupled with *Lucas's* distinction between real and personal property, this assures us the diversion program does not work a per se taking.[17]

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[16] We must clarify that we do not hold the RAC's market intervention constitutes "just compensation" for a taking. Because we hold no taking occurs, we do not conduct a just compensation inquiry. We discuss the RAC's purpose and organization solely to show that the Hornes' rights to the reserved raisins, even if diminished by the Marketing Order, are not extinguished by it.

[17] Nor would the Hornes fare any better under a *Lucas* theory. *Lucas* plainly applies only when the owner is deprived of all economic benefit of the property. 505 U.S. at 1019 & n. 8. If the property retains any residual value after the regulation's application, *Penn Central* applies. *Id.* The equitable stake, even in years where there is no monetary distribution, is clearly not valueless, and thus *Lucas* does not apply.

D

Instead of looking to *Loretto* for the rule of decision here, the Secretary urges us to apply the "nexus and rough proportionality" rule of *Nollan* and *Dolan* to this case, asking us in essence to hold that the reserve requirement constitutes a use restriction on the Hornes' personal property and then analogize that use restriction to the land use permitting context. We believe this approach is the most faithful way to apply the Supreme Court's precedents to the Hornes' claim.[18]

In *Nollan*, the California Coastal Commission conditioned the grant of a permit to build a beachfront home on the landowner's surrender of an easement along the coastal side of the property in order to link two public beaches by a publically accessible path. 483 U.S. at 828. However, the Commission's proffered reason for imposing this condition was to mitigate the diminished "visual access" to the ocean from the *non*-coastal edge of the property caused by the *Nollan*'s proposed improvement. *Id.* at 828–29. The Supreme Court held there was no "nexus" between the exaction-by-condition and the Commission's asserted state interest, then held that, absent such a nexus, the imposition of the condition was a taking. *Id.* at 837.

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[18] We do not mean to suggest that all use restrictions concerning personal property must comport with *Nollan* and *Dolan*. Rather, we hold *Nollan* and *Dolan* provide an appropriate framework to decide this case given the significant but not total loss of the Hornes' possessory and dispositional control over their reserved raisins.

Dolan provides us the analytical framework to apply in cases where a legitimate nexus exists between the asserted state interest and the proposed exaction. In *Dolan*, a landowner sought permits to enlarge and improve her commercial property. As in *Nollan*, the permitting agency approved the permit subject to certain conditions. First, the agency required the dedication of certain creek-side land for the purpose of mitigating the increased water run-off that could potentially occur as a result of the landowner's plan to pave a parking lot. Second, the agency required the dedication of a 15-foot strip of land to be used for a pedestrian and bicycle pathway, the purpose of which was to mitigate the increased traffic flow spawned by the proposed commercial development. 512 U.S. at 380. *Dolan* held there was an appropriate nexus between the state's legitimate interests and the proposed exactions. *Id.* at 387–88.

But *Dolan* also held the proposed means and the ends in question were not "roughly proportional[]" to each other and thus the permit as issued constituted a taking. *Id.* at 391; *see id.* at 394–96. While not reducible to mathematical certainty, the *Dolan* "rough proportionality" requirement does require a permitting agency to "make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* at 391. Thus, the distillate of the *Nollan/Dolan* rule appears to be this: If the government seeks to obtain, through the issuance of a conditional land use permit, a property interest the outright seizure of which would constitute a taking, the government's imposition of the condition *also* constitutes a taking unless it: (1) bears a sufficient nexus with and (2) is roughly

proportional to the specific interest the government seeks to protect through the permitting process.

We apply the *Nollan/Dolan* rule here because we believe it serves to govern this use restriction as well as it does the land use permitting process. At bottom, the reserve requirement is a use restriction applying to the Hornes insofar as they voluntarily choose to send their raisins into the stream of interstate commerce. The Secretary did not authorize a forced seizure of the Hornes' crops, but rather imposed a condition on the Hornes' *use* of their crops by regulating their sale. As we explained in a similar context over seventy years ago, the Marketing Order "contains no absolute requirement of the delivery of [reserve-tonnage raisins] to the [RAC]" but rather only "a conditional one." *Wallace v. Hudson-Duncan & Co.*, 98 F.2d 985, 989 (9th Cir. 1938) (rejecting a takings challenge to a reserve requirement under the walnut marketing order); *see also Yee v. City of Escondido*, 503 U.S. 519, 527–28 (1992) (holding municipal regulation of a mobile home park owners' ability to rent did not work a taking where park owners voluntarily rented their land and thus acquiesced in the regulation); *cf. Ruckelshaus*, 467 U.S. 986, 1070 (1994) ("a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking").

Moreover, there are important parallels between *Nollan* and *Dolan* on one hand and the raisin diversion program on the other. All involve a conditional exaction, whether it be the granting of an easement, as in *Nollan*; a transfer of title, as in *Dolan*; or the loss of possessory and dispositional

control, as here. All conditionally grant a government benefit in exchange for an exaction. And, critically, all three cases involve choice. Just as the *Nollans* could have continued to lease their property with the existing bungalow and Ms. *Dolan* could have left her store and unpaved parking lot as they were, the Hornes, too, can avoid the reserve requirement of the Marketing Order by, as the Secretary notes, planting different crops, including other types of raisins, not subject to this Marketing Order or selling their grapes without drying them into raisins. Given these similarities, we are satisfied the rule of *Nollan* and *Dolan* governs this case.

1. The Nexus Requirement

We now turn to the nexus requirement and ask if the reserve program "further[s] the end advanced as [its] justification." *Nollan*, 483 U.S. at 837. Unquestionably, the AMAA aims to "establish and maintain . orderly marketing conditions for agricultural commodities," 7 U.S.C. § 602(1), as well as to keep consumer prices stable, *id.* at § 602(2). By reserving a dynamic percentage of raisins annually such that the domestic raisin supply remains relatively constant, the Marketing Order program furthers the end advanced: obtaining orderly market conditions. The government represents (and the Hornes do not dispute) that by smoothing the peaks and valleys of the supply curve, the program has eliminated the severe price fluctuations common in the raisin industry prior to the implementation of the Marketing Order, making market conditions predictable for industry and consumers alike. On this basis, the Marketing Order satisfies the *Nollan* nexus requirement.

2. The Rough Proportionality Requirement

Dolan does not require a "precise mathematical calculation," instead obliging the permitting agency only to make an "individualized determination" that the condition imposed is "related both in nature and extent to the impact" of the permittee's activity. *Dolan*, 512 U.S. at 391. The Marketing Order meets this requirement. The percentage of raisins to be reserved is revised annually to conform to current market conditions. While *Dolan* does not require a "mathematical calculation," neither does it prohibit the RAC from imposing a condition stated mathematically, i.e., as a percentage. Indeed, here the RAC's imposition of the reserve requirement is not just in "rough" proportion to the goal of the program, but in more or less *actual* proportion to the end of stabilizing the domestic raisin market.[19] By annually modifying the "extent," *id.*, of the reserve requirement to keep pace with changing market conditions, the RAC ensures its program does not overly burden the producer's ability to compete while reducing to the producer's benefit the potential instability of this particular market.

Nor do we believe *Dolan*'s command that the condition imposed be "individualized" presents a problem here. As *Dolan* made clear, it was an adjudicative, not a legislative, decision being reviewed. 512 U.S. at 835. Individualized review

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[19] The Hornes do not challenge the adequacy or fairness of the RAC's decision to set the 2002–03 and 2003–04 reserve tonnage requirements at forty-seven percent and thirty percent, respectively. In other words, the Hornes' challenge is to the program itself, not the details of its implementation in the crop years at issue.

makes sense in the land use context because the development of each parcel is considered on a case-by-case basis. But here, the use restriction is imposed evenly across the industry; all producers must contribute an equal percentage of their overall crop to the reserve pool. At bottom, *Dolan*'s individualized review ensures the government's implementation of the regulations is tailored to the interest the government seeks to protect. The Marketing Order accomplishes this goal by varying the reserve requirement annually in accordance with market and industry conditions. Given that raisins are fungible (as opposed to land, which is unique), we think this is enough to ensure the means of the Marketing Order's diversion program is at least roughly proportional to its goals.[20]

CONCLUSION

While the Hornes' impatience with a regulatory program they view to be out-dated and perhaps disadvantageous to smaller agricultural firms is understandable, the courts are not well-positioned to effect the change the Hornes seek, which is, at base, a restructuring of the way government regulates raisin production. The Constitution endows Congress, not the courts, with the authority to

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[20] We reiterate that we analyze the Hornes' challenge to the monetary penalty through the lens of the Marketing Order's reserve requirement because the monetary penalty is pegged directly to the extent of the Hornes' non-compliance with the Order, as measured by the ton and market value of the raisins. Accordingly, we hold the Secretary's imposition of the penalty satisfies any requirement *Koontz* may impose that we independently analyze the monetary exaction under *Nollan* and *Dolan*.

regulate the national economy. *See United States v. Rock Royal Co-op, Inc.*, 307 U.S. 533, 572 (1939). Accordingly, it is to Congress and the Department of Agriculture to which the Hornes must address their complaints. The courts are not institutionally equipped to modify wholesale complex regulatory regimes such as this one.

Instead, our role is to answer the narrower question of whether the Marketing Order and its penalties work a physical per se taking. We hold they do not. There is a sufficient nexus between the means and ends of the Marketing Order. The structure of the reserve requirement is at least roughly proportional (and likely actually proportional) to Congress's stated goal of ensuring an orderly domestic raisin market. We reach these conclusions informed by the Supreme Court's acknowledgment that governmental regulation of personal property is more foreseeable, and thus less intrusive, than is the taking of real property. This, coupled with our observation that the Secretary has endeavored to preserve as much of the Hornes' ownership of the raisins as possible, leads us to conclude the Marketing Order's reserve requirements—and the provisions permitting the Secretary to penalize the Hornes for failing to comply with those requirements—do not constitute a taking under the Fifth Amendment.

AFFIRMED.

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	AMAA
	)	Docket No.
Marvin D. Horne and	)	04-0002
Laura R. Horne, d/b/a	)	
Raisin Valley Farms, a partnership	)	
and d/b/a Raisin Valley	)	
Farms Marketing Association,	)	
also known as	)	
Raisin Valley Marketing, an	)	
unincorporated association	)	
	)	
and	)	
	)	
Marvin D. Horne,	)	
Laura R. Horne,	)	
Don Durbahn, and	)	
The Estate of Rena Durbahn, d/b/a	)	
Lassen Vineyards, a partnership,	)	
	)	
Respondents	)	

Decision and Order

This is a disciplinary proceeding under the Agricultural Marketing Agreement Act of 1937, (AMAA), as amended, 7 U.S.C. § 601 *et seq.* It was instituted by the United States Department of Agriculture's Administrator of the Agricultural

Marketing Service (AMS) who alleged that respondents did not comply with the provisions of the federal marketing order and the implementing regulation that applied for crop years 2002-2003 and 2003-2004 to first handlers of raisins produced from grapes grown in California (7 C.F.R. §§ 989.1-989.95 (Raisin Order), and 7 C.F.R. § 989.166 (Reserve tonnage regulation)). Under the Raisin Order and the Reserve tonnage regulation, first handlers are required to: (1) obtain inspections of raisins acquired or received (7 C.F.R. § 989.58(d)); (2) hold acquired raisins designated as reserve tonnage for the account of the Raisin Administrative Committee (RAC) (7 C.F.R. § 66 and 7 C.F.R. § 989.166); (3) file accurate reports with the RAC (7 C.F.R. § 73); (4) allow access to their records to verify their accuracy (7 C.F.R. § 989.77); and (5) pay assessments to the RAC (7 C.F.R. § 989.80). Respondents dispute that they are handlers in that they never obtained any raisins through purchase or transfer of ownership to any of the business entities that they operate and argue, therefore, they did not *acquire* raisins within the meaning of the Raisin Order. Respondents further argue that they are not subject to the requirements of the Raisin Order because they are farmers/producers who have acted in good faith to advance the stated policy of the Farmer-to-Consumer Direct Marketing Act of 1976, 7 U.S.C. §§ 3001-3006.

I held oral hearings in Fresno, California at which transcribed testimony was taken and exhibits were received (February 9-11, 2005 (Tr. I); May 23, 2006 (Tr. II)). AMS was represented at the first hearing by Frank Martin, Jr., Esq. who was joined at the second hearing by Babak A. Rastgoufard, Esq. Both are attorneys with the Office of the General Counsel,

United States Department of Agriculture. Respondents were represented by David Domina, Esq. and Michael Stumo, Esq. Complainant and respondents simultaneously filed their second post-hearing proposed findings, conclusions and supporting briefs on November 1, 2006.

Upon consideration of the record evidence, review of the provisions of the controlling Raisin Order, regulations and applicable and cited statutes, as well as the arguments of the parties, I have found and concluded that respondents Marvin D. Horne, Laura R. Horne, Don Durbahn and Reba Durbahn, now deceased, acting together as partners doing business as Lassen Vineyards, at all times material herein, acted as a first handler of raisins subject to the inspection, assessment, reporting, verification and reserve requirements of the Raisin Order and the Reserve tonnage regulation. I further find that these respondents violated the AMAA and the Raisin Order by failing to obtain inspections of acquired incoming raisins; failing to hold requisite tonnages of raisins in reserve; failing to file accurate reports; failing to allow access to their records; and failing to pay requisite assessments. I have concluded that the Farmer-to-Consumer Direct Marketing Act of 1976 has not exempted farmers/producers who act as handlers from being subject to regulation by federal marketing orders. I have further concluded that the violations by Marvin D. Horne, Laura R. Horne and Don Durbahn, on behalf of and doing business as Lassen Vineyards, require the entry of an order directing them to pay the RAC assessments they have failed to pay, and to pay the RAC the dollar equivalent of the raisins they failed to hold in reserve. Moreover, I have concluded that their

violations were deliberate and were designed to obtain an unfair competitive advantage over other California raisin handlers who were in compliance with the Raisin Order, and a civil penalty should therefore be assessed against them (excluding Rena Durbahn, now deceased) pursuant to 7 U.S.C. § 608c(14)(B), in the amount of $731,500.

Findings of Fact

1. Marvin D. Horne is a farmer who has farmed since 1969, growing Thompson seedless grapes for raisins. He does business with his wife Laura R. Horne as "Raisin Valley Farms" which is a registered trademark for their grape growing and raisin producing activities that are the largest in the California valley where most of the world's raisins are produced (Tr. I, at 868-869). Marvin D. Horne and Laura R. Horne also do business as Raisin Valley Farms Marketing Association (also known as Raisin Valley Marketing). Both Raisin Valley Farms and Raisin Valley Farms Marketing Association have the same business mailing address: 3678 North Modoc, Kerman, California 93630 (Tr. I, at 873).

2. During the 2002-2003 and 2003-2004 crop years, Marvin D. Horne and Laura R. Horne also operated a general partnership with Laura's father, Don Durbahn, and Laura's mother, Rena Durbahn (now deceased). This partnership did business and continues to do business as Lassen Vineyards at 2267 North Lassen, Kerman, California 93630. Prior to 2002, Lassen Vineyards was exclusively a farming partnership that produced Thompson seedless grapes made into raisins (Tr. I, at 870). In 2001, the partnership ordered packing plant equipment that it commenced to use in 2002 (Tr. I, at 871-873).

3. Marvin D, Horne was a member or alternate member of the RAC for six years (Tr. I, at 175). As early as 1998, Marvin D. Horne and Laura R. Horne indicated to the RAC their interest in acting as a handler of California raisins under the Raisin Order (CX 94). In crop years 2001-2002, 2002-2003, and 2003-2004, Mr. and Mrs. Horne's partnership, Raisin Valley Farms, filed notifications with the RAC of intentions to handle raisins as a packer under the Raisin Order (CX-98, CX-100 and CX-102).

4. Mr. Horne has both met and corresponded with representatives of the United States Department of Agriculture who have advised him concerning his responsibilities as a handler under the Raisin Order (CX-94, RX-100-103, RX 113, Tr. I, at 169-171).

5. On March 15, 2001, Marvin D. Horne and Laura R. Horne, acting as Raisin Valley Farms, through their then attorney, wrote to the Secretary of Agriculture and asked whether the obligations of the federal raisin marketing order regarding volume regulation, quality control, payment of assessments to the Raisin Administrative Committee and reporting requirements would apply if Raisin Valley Farms had its raisins "custom packed" by the Del Rey Packing Company, a packer that would not take title to Raisin Valley Farms' raisins. On April 23, 2001, the Deputy Administrator, Fruit and Vegetable Programs, United States Department of Agriculture, replied on behalf of the Secretary (RX 98 (Appendix A); and Tr. II, at 957-960). The Deputy Administrator explained that under such circumstances, Raisin Valley Farms would be neither a packer nor a handler, but that Del Rey would be both. This type of arrangement, in which the grower

retains title and has his raisins packed for a fee is, the Deputy Administrator explained, comparable to "toll packing", a form of raisin acquisition by a handler that was recognized as such by the promulgation record underlying the Raisin Marketing Order. He further explained that under section 989.17 of the Raisin Order, 7 C.F.R. § 989.17, once an entity has or obtains physical possession of raisins at a packing or processing plant, it has "acquired" raisins within the meaning of the section, and thus Del Rey would:

> ...be required to meet the order's obligations regarding volume regulation, quality control, payment of assessments to the Raisin Administrative Committee (RAC), and reporting requirements.

(RX 98 (Appendix A), at 1).

The Deputy Administrator enclosed portions of the 1949 Recommended Decision and hearing testimony relevant to the question that showed it had been expressly considered and discussed in the hearing record and in the Secretary's stated rationale for promulgating the Raisin Order. (These enclosures are part of RX 98, attached to this Decision and Order as Appendix A).

6. On April 23, 2002, Mr. and Mrs. Horne notified the Secretary of Agriculture that they were registering as a handler under the Raisin Order under protest, but agreed to comply with its volume control (reserve) provisions (CX-101).

7. Marvin D. Horne was also specifically advised, on May 20, 2002, by the Administrator of Marketing

and Regulatory Programs, AMS, in response to an e-mail and a letter Mr. Horne had sent to the Secretary of Agriculture, that if he packed and handled his own raisins:

> Such activities would make you a handler under the order. As a handler, you would be required to meet all of the order's regulations regarding volume control, quality control (incoming and outgoing inspection), assessments, and reporting to the RAC.
>
> (RX 101, attached to this Decision and Order as Appendix B).

8. The Departmental interpretations of the terms of the Raisin Order that Marvin D. Horne requested and received were expressly disregarded. Though he did not have Del Rey custom pack his raisins, Mr. Horne elected to set up a family-owned toll packing operation at Lassen Vineyards and pack raisins for his family, and for growers for a fee (Tr. I, at 977). Contrary to the interpretive advice Marvin D. Horne had received from USDA, Lassen Vineyards did not pay any assessments, did not have any incoming inspections performed, did not file any reports, and did not hold any raisins in reserve in respect to any of the raisins Lassen Vineyards received from and packed for growers during the 2002-2003 and 2003-2004 crop years (Tr. I, at 965-973).

9. Lassen Vineyards, a general partnership operated by Marvin D. Horne, together with his partners, Laura R. Horne, Don Durbahn, and the late Rena Durbahn, owned land at 2267 N. Lassen, Kerman, California 93630, where they owned and

operated equipment and a raisin packing plant that they used, in the crop years 2002-2003 and 2003-2004, to stem, sort, clean, grade and package California raisins for themselves and, for a fee, for others (Tr. II, at 25-27, and 962). The only difference Mr. Horne could state between the way packing was conducted at Lassen Vineyards and by a toll packer charging a fee for sorting, cleaning and packing raisins in boxes was that the packed product could leave Lassen Vineyards without the farmer being required to pay fees up front (Tr. I, at 979).

10. During crop years 2002-2003 and 2003-2004, Lassen Vineyards charged producers a 12 cent per pound fee to pack raisins and five dollars for the use of each pallet upon which the boxed raisins were stacked (Tr. II, at 28 and 44). The cost for labor and packaging materials was included in the fee charged (Tr. II, at 30-31, 44, and 48). Some raisin producers were given discounts from these fees for services they performed or the volumes of raisins they had packed at the plant (Tr. II, at 39-43). The packing activities at Lassen Vineyards were supervised by Don Durbahn and by Marvin A. Horne, Mr. and Mrs. Marvin D. Horne's son (Tr. I, at 879-880). The workers who performed the packing activities at Lassen Vineyards were "leased employees" who were leased by Laura R. Horne and Rena Durbahn for Lassen Vineyards (Tr. I, at 933-934). All of the raisins packed by Lassen Vineyards in crop years 2002-2003 and 2003-2004, were packaged in boxes stamped with the handler number 94-101 that had been assigned to Marvin D. Horne and Laura R. Horne (Tr. I, at 964-965).

11. During crop years 2002-2003 and 2003-2004, Mr. and Mrs. Horne also conducted business as a not-for-profit unincorporated grower association named Raisin Valley Farms Marketing Association (also known as Raisin Valley Marketing). It was formed by Mr. and Mrs. Horne to "attract the market of buyers" and allow them and other raisin growers to market their raisins together under the Hornes' protected trade name "Raisin Valley Farms" (Tr. II, at 874-878). Sixty raisin growers were members of Raisin Valley Farms Marketing Association (Tr. II, at 55). Mr. Horne conducted the marketing activities of Raisin Valley Farms Marketing Association and sold the packaged raisins either himself or through brokers (Tr. II, at 38 and 49). When the sale of the packaged raisin was negotiated through a broker, the grower whose raisins were sold had the brokerage fee and the fee for the packing performed by Lassen Vineyards deducted from his payment check (Tr. II, at 50-51). When the sale was made without an outside broker, the grower's payment check was reduced by the fee for the packing services performed by Lassen Vineyards and by charges by the Association in the form of an accounting fee and for a fund to protect members from customers who fail to pay (Tr. II, at 51-52). Mr. Horne acknowledged that Lassen Vineyards benefited under these arrangements from the fees that it received from growers for "the rental of its equipment" (Tr. II, at 52).

12. When Mr. Horne or a broker found a buyer who desired raisins, Mr. Horne contacted one of Raisin Valley Farms Marketing Association's members on a rotational basis (that included the Raisin Valley Farms and the growing operations of

Lassen Vineyards) and asked them to bring their raisins to Lassen Vineyard's packing plant to be stemmed, sorted, cleaned, graded and packaged (Tr. II, at 55-57). After the raisins were packed, the buyer's trucks picked them up, left a bill of lading and when the buyer paid, the money went into an Association bank account, out of which the grower was paid less deductions for brokerage, if any, and the packing fees owed and paid to Lassen Vineyards (Tr. II, at 58-60).

13. On or about August 3, 2002, the respondents[1] submitted an inaccurate RAC-1 Form, Weekly Report of Standard Raisin Acquisitions, to the Raisin Administrative Committee (RAC). The respondents reported to the RAC that they did not acquire any California raisins during this time period. However, the record evidence shows that they acquired substantial amounts of California raisins during this time period (CX-1-2, CX-62, CX-82-87, CX-171-582, Tr. I, at 76-79 and 188-190).

14. From August 1, 2003 to November 30, 2003, the respondents submitted 13 inaccurate RAC-1 Forms Weekly Report of Standard Raisin Acquisitions, to the Raisin Administrative Committee (RAC). The respondents reported to the RAC that they did not acquire any California raisins during this time period. However, the record evidence shows that they acquired substantial

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[1] As hereinafter used in the Decision and Order, "the respondents" refers to Marvin D. Horn; Laura R. Horne, Rena A. Durbahn and Don Durbahn acting on behalf of or doing business as Lassen Vineyards.

amounts of California raisins during this time period (CX-3-56, CX-63-75, CX-171-582, Tr. I, at 80-101).

15. From August 1, 2003 to November 30, 2003, the respondents submitted four inaccurate RAC-20 Forms, Monthly Reports of Free Tonnage Raisin Disposition, to the RAC. The respondents reported to the RAC that they did not ship or dispose of any California raisins during this time period. However, the record evidence shows that the respondents shipped substantial amounts of California raisins during this time period (CX-3-56, CX-76-79, CX-171-582, Tr. I, at 80-101).

16. During crop year 2002-2003, the respondents submitted an inaccurate RAC-50 Form, Inventory of Free Tonnage Standard Quality Raisins on Hand, to the RAC. The respondents reported to the RAC that they did not have any California raisin inventories during this time period. However, the record evidence shows that they had inventories of California raisins in that they were shipping substantial amounts of California raisins during this time period (CX-1-2, CX-80, CX-82-87, CX-171-582, Tr. I, at 76-79).

17. During crop year 2002-2003, the respondents submitted an inaccurate RAC-51 Form, Inventory of Off-Grade Raisins on Hand, to the RAC. The respondents reported to the RAC that they did not have any California raisin inventories during this time period. However, the record evidence shows that they had inventories of California raisins in that they were shipping substantial amounts of California raisins during this time period (CX-1-2, CX-81-87, Tr. I, at 76-79).

18. During crop year 2002-2003, the respondents failed to obtain incoming inspections on approximately 1,504,020 pounds of California raisins (CX-170-582, Tr. I, at 76-79).

19. During crop year 2003-2004, the respondents failed to obtain incoming inspection on fifty-two occasions for approximately 2,066,066 pounds of California raisins (CX-3-54, CX-56, Tr. I, at 90, 97-99 and 967-970).

20. During crop year 2002-2003, the respondents failed to hold in reserve for 294 days approximately 369.8 tons of California Natural Sun-dried Seedless raisins (CX-1, CX-2, CX-171-582, Tr. I, at 176-179, 965 and 973). During crop year 2002-2003, the free tonnage price (field price) for California raisins was $745.00 a ton (CX-583). The respondents failed to pay $275, 501, to the RAC for California raisins they failed to hold in reserve for crop year 2002-2003 (CX-161, CX-171-582, Tr. I, at 972-973). The RAC issued two demand letters to the respondents to deliver reserve California raisins or to pay the dollar equivalent (RX-136-137).

21. During crop year 2003-2004, the respondents failed to hold in reserve for 298 days approximately 305.6 tons of California Natural Sun-Dried Seedless raisins (CX-3-54, CX-89, Tr. I, at 90 and 222-225). During crop year 2003-2004, the free tonnage price (field price) for California raisins was $810 a ton (CX-93, CX-583, Tr. I, at 225). The respondents failed to pay $247,536.00, to the RAC for California raisins they failed to hold in reserve for crop year 2003-2004 (CX-89, Tr. I, at 225 and 972-973). The RAC issued two demand letters to the respondents to

deliver reserve California raisins or to pay the dollar equivalent (RX-136-137).

22. During crop year 2002-2003, the respondents failed to pay assessments to the RAC of approximately $3,438.10 (CX-1-2, CX-171-582, Tr. I, at 76-79 and 217- 222).

23. During crop year 2003-2004, the respondents failed to pay assessments to the RAC of approximately $5,951.63 (CX-3-54, Tr. I, at 90, 222-226, and 972-973).

24. The respondents failed to allow access to their records to the U.S. Department of Agriculture, even after being served with two subpoenas for such access (CX-153, CX-154, CX-164, RX-106, Tr. I, at 422-432 and 946-947).

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.

2. On August 3, 2002, the respondents violated section 989.73(b) of the Raisin Order (7 C.F.R. § 989.73(b)), by submitting an inaccurate RAC-1 Form, Weekly Report of Standard Raisin Acquisitions, to the Raisin Administrative Committee (RAC).

3. From August 1, 2003 to November 30, 2003, the respondents violated section 989.73(b) of the Raisin Order (7 C.F.R. §989.73(b)0, by submitting thirteen inaccurate RAC-1 Forms, Weekly Reports of Standard Raisin Acquisitions, to the RAC.

4. From August 1, 2003 to November 30, 2003, the respondents violated section 989.73(d) of the Raisin Order (7 C.F.R. §989.73(d)), by submitting four

inaccurate RAC-20 Forms, Monthly Reports of Free Tonnage Raisin Disposition, to the RAC.

5. The respondents violated section 989.73(a) of the Raisin Order (7 C.F.R. §989.73(a)), by filing an inaccurate RAC-50 Form, Inventory of Free Tonnage Standard Quality Raisins on Hand, to the RAC for crop year 2002-2003.

6. The respondents violated section 989.73(a) of the Raisin Order (7 C.F.R. §989.73(a)), by filing an inaccurate RAC-51 Form, Inventory of Off-Grade Raisins on Hand, to the RAC for crop year 2002-2003.

7. The respondents violated section 989.58(d) of the Raisin Order (7 C.F.R. §989.58(d)), by failing to obtain incoming inspections for approximately 1,504,020 pounds of California raisins for crop year 2002-2003.

8. The respondents violated section 989.58(d) of the Raisin Order (7 C.F.R. §989.58(d)), on fifty-two occasions by failing to obtain incoming inspections for approximately 2,066,066 pounds of California raisins for crop year 2003-2004.

9. The respondents violated section 989.66 of the Raisin Order (7 C.F.R. §989.66) and section 989.166 of the Regulations (7 C.F.R. §989.166), by failing to hold in reserve for 294 days approximately 369.8 tons of California Natural Sun-dried Seedless raisins, and by failing to pay to the RAC $275,501.00, the dollar equivalent of the California raisins that were not held in reserve for crop year 2002-2003.

10. The respondents violated section 989.66 of the Raisin Order (7 C.F.R. §989.66) and section 989.166 of the Regulations (7 C.F.R. § 989.166), by failing to

hold in reserve for 298 days approximately 305.6 tons of California Natural Sun-Dried Seedless raisins, and by failing to pay to the RAC $247,536.000, the dollar equivalent of the California raisins that were not held in reserve for crop year 2003-2004.

11. The respondents violated section 989.80 of the Raisin Order (7 C.F.R. §989.80), by failing to pay assessments to the RAC of approximately $3,438.10 for crop year 2002-2003.

12. The respondents violated section 989.80 of the Raisin Order (7 C.F.R. §989.80), by failing to pay assessments to the RAC of approximately $5,951.63 for crop year 2003-2004.

13. The respondents violated section 989.77 of the Raisin Order (7 C.F.R. §989.77), by failing to allow access to their records to the U.S. Department of Agriculture, even after being served with two subpoenas for such access.

Discussion

The handling of California raisins is subject to the requirements of the Raisin Order that came into being at the request of the raisin industry. The industry request was made to the Secretary of Agriculture pursuant to the AMAA that provides marketing tools for avoidance of disruption of the orderly exchange of agricultural commodities in interstate commerce (7 U.S.C. § 601). Among the marketing tools authorized by the AMAA for inclusion in marketing orders, are provisions that require handlers to comply with commodity inspection provisions and reserve pool requirements that withhold for a time a portion of an agricultural

commodity from the market in order to keep prices from being depressed and to yield an equitable distribution of the net returns realized in the future when the reserve is sold (7 U.S.C. § 608c(6)(E)and(F)). The AMAA also authorizes marketing orders to be administered by industry committees and for the issuance of rules and regulations to effectuate the provisions of the marketing order (7 U.S.C. § 608c(7)(C) and(D)). The constitutionality of marketing orders promulgated pursuant to the AMAA has been upheld by the Supreme Court:

> Appropriate respect for the power of congress to regulate commerce among the States provides abundant support for the constitutionality of these marketing orders....

Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 427, 476, 117 S. Ct. 2130, 2141, 138 L.Ed. 585 (1997).

Provisions in marketing orders that require handlers to hold a portion of a commodity in reserve and pay assessments to an Administrative Committee to defray its expenses cannot be used as grounds for a taking claim since handlers no longer have a property right that permits them to market their crop free of regulatory control. *Cal-Almond, Inc.*, 30 Fed Cl. 244, 246-247 (1994), *affirmed*, 73 F.3d 381, *cert. denied*, 519 U.S. 963 (1996).

Nor may a person classified as a handler by a marketing order and made subject to its regulatory control, successfully assert an equal protection challenge when the Secretary has set forth a rational basis for the classification. *Lamers Dairy Inc.*, 60

Agric Dec. 406, at 428 (2001) *citing, F.C.C. v. Beach Communications, Inc.* 508 U.S. 307, 313 (1993),

In response to a request for a marketing order from the California raisin industry, a hearing was held at Fresno, California on December 13 through 16, 1948. Upon the basis of the evidence received at the hearing, a decision was issued that recommended the promulgation of the Raisin Order and enunciated a rational basis for its issuance and for its various terms and provisions (14 Fed Reg. 3083). Interested parties were given an opportunity to file written exceptions to the recommended decision (Ibid). Upon consideration of the exceptions that were filed and the record evidence presented at the hearing, the Secretary of Agriculture, on July 8, 1949, found that the issuance of the Raisin Order as set forth in the recommended decision, would effectuate the declared policy of the AMAA, and ordered that a referendum be conducted among producers of raisin variety grapes grown in California to determine whether at least two-thirds of them favored its issuance (14 Fed. Reg. 3858 and 3868). The referendum was conducted and the requisite percentage of producers was found to favor the Raisin Order's terms and provisions. Those terms and provisions, as periodically amended through subsequent rulemaking proceedings, were fully applicable and governed the handling of California raisins during the 2002-2003 and 2003-2004 crop years when respondents via their partnership Lassen Vineyards, acted as first handlers of raisins.

Marvin D. Horne, his family and the growers who joined his marketing association decided to enhance their profitability by avoiding the requirements of

the Raisin Order. By so doing, respondents obtained an unfair competitive advantage over everyone in the raisin industry who complied with the Raisin Order and its regulations. That is what this proceeding is really about. Respondents' discussion of what *acquire* means and their expressed desire to achieve the policy of the Farmer-to-Consumer Direct Marketing Act are simply attempts to divert attention from their efforts to gain unfair advantage by freeing themselves from regulations the rest of their industry observed as the best way for all raisin growers and handlers to realize optimum prices.

The Raisin Order's regulatory provisions apply to "handlers" who "first handle" raisins. A "handler" is defined in the raisin order to include "any processor or packer" (7 C.F.R. § 989.15). A "packer" is defined as meaning "...any person who, within the area, stems, sorts, cleans, or seeds raisins, grades stemmed raisins, or packages raisins for market as raisins" (7 C.F.R. § 989.14). A handler becomes a "first handler" when he "acquires" raisins, a term specifically and plainly defined by the Raisin Order:

> *Acquire* means to have or obtain physical possession of raisins by a handler at his packing or processing plant or at any other established receiving station operated by him....*Provided*....., That the term shall apply only to the handler who first acquires raisins.
>
> 7 C.F.R. § 989.17, emphasis by underlining added.

Findings of Fact 7, 8 and 9, conclusively demonstrate that the respondents in their operation of the packing house they owned as Lassen Vineyards came within each of these definitions during crop years 2002-2003 and 2003-2004. As such they were required as a handler to: (1) cause an inspection and certification to be made of all natural condition raisins acquired or received (7 C.F.R. § 989.58(d)); (2) hold in storage all acquired reserve tonnage as established by the controlling Reserve tonnage regulation (7 C.F.R. § 989.66, and 7 C.F.R. § 989.166); (3) file certified reports showing: inventory, acquisition and other information required by the Raisin Committee to enable it to perform its duties (7 C.F.R. § 73); (4) allow access to inspect the packing house premises, the raisins held there, and all records for the purposes of checking and verifying reports filed (7 C.F.R. § 989.77); and (5) pay assessment to the Raisin Committee with respect to free tonnage acquired, and any reserve tonnage released or sold for use in free tonnage outlets (7 C.F.R. § 989.80).

Respondents' arguments that they did not *acquire* raisins are unavailing in light of the plain meaning of the language of the Raisin Order defining *acquire*. Moreover, if there was any ambiguity, the interpretation given by the Department of Agriculture both at the time of the Raisin Order's issuance and in subsequent correspondence with the Hornes, is clear, straightforward, of long-standing and controlling. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); and *Barnhart v. Walton*, 535 U.S. 212, 122 S.Ct. 1265, 152 L.Ed.2d 330 (2002).

The 1949 proposed decision which was adopted as part of the Secretary's final decision, after explaining the need for the Raisin Order, explained the language employed and clarified that:

> The term "acquire" should mean to obtain possession of raisins by the first handler thereof. The significance of the term "acquire" should be considered in light of the definition of "handler" (and related definitions of "packer" and "processor") in that the regulatory features of the order would apply to any handler who acquires raisins. Regulation should take place at the point in the marketing channel where a handler first obtains possession of raisins, so that the regulatory provisions of the order concerning the handling of raisins would apply only once to the same raisins. Numerous ways by which handlers might acquire raisins were proposed for inclusion in the definition of the term, the objective being to make sure that all raisins coming within the scope of handlers' functions were covered and, conversely, to prevent a way being available whereby a portion of the raisins handled in the area would not be covered. Some of the ways by which a handler might obtain possession of raisins include: (i) Receiving them from producers, dehydrators, or others, whether by purchase, contract, or by arrangement for toll packing, or packing for a cash consideration;....

14 Fed. Reg. 3086 (1949).

This interpretation was consistent with testimony at the hearing conducted to consider the need of the raisin industry for a marketing order and its appropriate terms:

> Q. Mr. Hoak, suppose a packer stems, cleans, and performs other operations connected with the processing of raisins for a producer and then the producer sells the raisins to another packer. Under this proposal, which person should be required to set the raisins aside?
>
> A. The man who performs the packing operation, who is the packer.
>
> Q. Mr. Hoak, I believe that you have testified earlier that the term "packer" should include a toll packer. By that do you mean that it should include a person who takes raisins for someone for a fee?
>
> A. That is right.
>
> Q. Also, did I understand you to say that that person should be the one who would be required to set aside or establish the pools under the regulatory provisions?
>
> A. That is right. He is the man who would be held responsible for setting aside the required amount of raisins.
>
> Q. I take it that that man would not have title to any raisins as he is a toll packer; is that correct?

A. That is right.

Hearing transcript at 182-183, see Appendix A.

These excerpts from the recommended decision and the hearing transcript were sent to an attorney representing Mr. and Mrs. Horne on April 23, 2001. Apparently, they believe their personal interpretation of the word *acquire* as used in the Raisin Order should take precedent over its plain language and the interpretation of its meaning that was conveyed to them by the Department of Agriculture. But under *Chevron* the interpretation by an agency of a regulation it issued in implementation of a statute is, unless illegal, controlling. The decision of the Hornes to not follow the Department of Agriculture's interpretative advice, and instead to play a kind of shell game with interlocking partnerships and a marketing association to try to conceal their role as first handler, only shows that they acted willfully and intentionally when they decided to not file reports, not hold raisins in reserve, not have incoming raisins inspected, not pay assessments, and not allow inspection of their records for verification purposes.

The respondents have also advanced the patently specious argument that they were exempted from handler obligations under the Raisin Order because they were attempting to promote the policy of the Farmer-to-Consumer Direct Marketing Act of 1976, 7 U.S.C. §§ 3001-3006. Nowhere does the 1976 Act refer to the AMAA or make any suggestion that any of its terms have been supplanted. Moreover, the type of activity that the 1976 Act looked to encourage was the farmer market where farmer and consumer could come together directly and avoid middlemen.

The respondents were instead marketing raisins to candy makers and food processors as ingredients.

Nor does the fact that the respondents primarily consider themselves to be producers exempt them from regulation by the Raisin Order for their performance of handler functions. The AMAA does exempt from a marketing order's regulation "any producer in his capacity as a producer" 7 U.S.C. § 608c(13)(B). This has given rise to specific but limited producer-handler exemption provisions in marketing orders that regulate the handling of milk. The potential harm, these exemptions may inflict on other producers and handlers was, however, recognized and explained in *United Dairymen of Arizona v. Veneman*, 279 F.3d 1160, 1165-1166 (9th Cir 2002).

In the instant proceeding, the respondents undertook to no longer confine themselves to producer functions but to also engage in handler functions that are regulated by the Raisin Order and are not within any exemption. The fact that a portion of the raisins they packed at the Lassen Vineyard packing house were raisins of their own production did not serve to exempt their handling and packing of those raisins from regulation. Mr. and Mrs. Horne had been specifically so advised by letter, dated May 20, 2002, from the Administrator of AMS:

> You indicate in your correspondence that you plan to pack and market your own raisins. Such activities would make you a handler under the order. As a handler, you would be required to meet all of the order's regulations regarding volume

> control, quality control (incoming and outgoing inspection), assessments, and reporting to the RAC.

RX-101, Appendix B

Under these circumstances, the respondents should be ordered to pay the assessments they withheld from the RAC, pay the dollar equivalent of the raisins they failed to hold in reserve, and be assessed a civil penalty pursuant to 7 U.S.C. § 608c(14)(B).

In determining the amount of the civil penalty, I have reviewed the recommendation of AMS in light of applicable holdings by the Judicial Officer respecting the appropriate amount to be imposed for violations similar to those committed by the respondents. See Calabrese, 51 Agric. Dec. 131, 161 (1992); *Saulsbury Enterprises*, 55 Agric. Dec. 6, 52-58 (1996); and *Strebin Farms*, 56 Agric. 1095, 1152-1157 (1997). Intentional violations of a marketing order's requirements that a handler shall pay assessments, have inspections performed, hold a percentage of the raisins handled in reserve, and file specified reports have all been held to be serious violations of both the AMAA and or a controlling marketing order that fully warrant civil penalties of $1,100 for each violation with "....each day during which such violation continues...deemed a separate violation...." (7 U.S.C. § 608c(14(B)).

Accordingly, I am following the recommendation of AMS that civil penalties be imposed on the respondents of $651,200, $1,100 per day for each of the 592 days of the crop years 2002-2003 and 2003-2004 that they failed to hold California raisins in

reserve, and $80,300 for their failure to obtain inspections and file accurate reports. Civil penalties in these amounts are needed to deter the respondents from continuing to violate the Raisin Order and to deter others from similar or future violations. See Calabrese, *supra* at 162.

The following Order is herewith issued.

ORDER

It is ORDERED that respondents, Marvin D. Horne, Laura R. Horne and Don Durbahn, who do business as Lassen Vineyards, a general partnership, jointly and severally, are assessed a civil penalty of $731,500, are further ordered to pay to the Raisin Administrative Committee $9,389.73 in assessments for crop years 2002-2003 and 2003-2004, and are further ordered to pay to the Raisin Administrative Committee $523,037 for the dollar equivalent of the California raisins they failed to hold in reserve for crop years 2002-2003 and 2003-2004.

A certified check or money order in payment of the civil penalty shall be sent in the amount of $731,500 made payable to "Treasurer of the United States" to Frank Martin, Jr. or Babak A. Rastgoufard, Office of the General Counsel, Room 2343-South Bldg., United States Department of Agriculture, Washington, DC 20250-1417. Payments of the $9,389.73 for owed assessments, and of the $523,037 for the dollar equivalent of the California raisins that were not held in reserve shall be sent to the Raisin Administrative Committee. These payments shall all be made within 100 days after this order becomes effective.

The provisions of this order shall become effective on the first day after this decision becomes final. Unless appealed pursuant to the Rules of Practice at 7 C.F.R. § 1.145(a), this decision becomes final without further proceedings 35 days after service as provided in the Rules of Practice, 7 C.F.R. § 1.142(c)(4).

Copies of this Decision and Order shall be served upon the parties.

Done at Washington, DC
this 8th day of December, 2006

_____

Victor W. Palmer
Administrative Law Judge

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	AMAA
	)	Docket No.
Marvin D. Horne and Laura R.	)	04-0002
Horne, d/b/a Raisin Valley Farms,	)	
a partnership and d/b/a Raisin	)	
Valley Farms Marketing	)	
Association, a/k/a Raisin Valley	)	
Marketing, an unincorporated	)	
association	)	
	)	
and	)	
	)	
Marvin D. Horne, Laura R.	)	
Horne, Don Durbahn, and	)	
The Estate of Rena Durbahn, d/b/a	)	
Lassen Vineyards, a partnership,	)	
	)	
Respondents	)	

Decision and Order

PROCEDURAL HISTORY

The Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Administrator], instituted this disciplinary proceeding on April I, 2004, by filing a Complaint alleging that, during crop years 2002-2003 and 2003-2004, Marvin D. Horne and Laura R.

Horne, d/b/a Raisin Valley Farms, did not comply with the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. §§ 601-674) [hereinafter the AMAA], and the federal order regulating the handling of Raisins Produced from Grapes Grown in California (7 C.F.R. pt. 989) [hereinafter the Raisin Order]. On October 25, 2004, the Administrator filed an Amended Complaint which made minor amendments to the Complaint. On August 10, 2005, with permission from Administrative Law Judge Victor W. Palmer [hereinafter the ALJ], the Administrator filed a Second Amended Complaint. In the Second Amended Complaint, the Administrator made amendments to conform the Complaint to the evidence presented at the hearing conducted on February 9-11, 2005, as well as to add Raisin Valley Farms Marketing Association, also known as Raisin Valley Marketing, an unincorporated association, and Marvin D. Horne, Laura R. Horne, Don Durbahn, and the Estate of Rena Durbahn, a partnership, d/b/a Lassen Vineyards, as parties to the proceeding.

Under the Raisin Order, handlers[1] who first handle the raisins are required to: (1) obtain

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[1] The term "handler" means: (a) any processor or packer; (b) any person who places, ships, or continues natural condition raisins in the current of commerce from within the area to any point outside the area; (c) any person who delivers off-grade raisins, other failing raisins or raisin residual material to other than a packer or other than into any eligible non-normal outlet; or (d) any person who blends raisins: *Provided*, That blending shall not cause a person not otherwise a handler to be a handler on account of such blending if he is either: (1) a producer who, in his capacity as a producer, blends raisins entirely of his own production in the course of his usual and customary practices of

inspections of raisins acquired or received (7 C.F.R. § 989.5 8(d)); (2) hold acquired raisins designated as reserve tonnage for the account of the Raisin Administrative Committee [hereinafter the RAC] (7 C.F.R. §§ 989.66, .166); (3) file accurate reports with the RAC (7 C.F.R. § 989.73); (4) allow access to records to verify the accuracy of the records (7 C.F.R. § 989.77); and (5) pay assessments to the RAC (7 C.F.R. § 989.80).

Marvin D. Horne and the other respondents dispute that they are handlers claiming they never obtained any raisins through purchase or transfer of ownership to any of the business entities that Mr. Horne and his partners operate. Mr. Horne and his partners argue they did not *acquire* raisins within the meaning of the Raisin Order. They further argue they are not subject to the requirements of the Raisin Order because they are farmers/producers who have acted in good faith to advance the stated policy of the Farmer-to-Consumer Direct Marketing Act of 1976 (7 U.S.C. §§ 3001-3006).

The ALJ held an oral hearing in Fresno, California, on February 9-11, 2005 (Tr. I), and May 23, 2006 (Tr. II). Frank Martin, Jr., Office of the General Counsel, United States Department of Agriculture, represented the Administrator during the portion of the hearing conducted on February 9-11, 2005. Babak A. Rastgoufard, Office of the

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preparing raisins for delivery to processors, packers, or dehydrators; (2) a person who blends raisins after they have been placed in trade channels by a packer with other such raisins in trade channels; or (3) a dehydrator who, in his capacity as a dehydrator, blends raisins entirely of his own manufacture (7 C.F.R. § 989.15).

General Counsel, United States Department of Agriculture, joined Mr. Martin during the May 23, 2006, portion of the hearing. David A. Domina and Michael Stumo, DominaLaw Group, Omaha, Nebraska, represented Mr. Horne and the other respondents.

On December 8, 2006, the ALJ issued a Decision and Order in which he found that Marvin D. Horne, Laura R. Horne, Don Durbahn, and Rena Durbahn, now deceased, acting together as partners doing business as Lassen Vineyards,[2] at all times material to this proceeding, acted as a handler of raisins subject to the inspection, assessment, reporting, verification, and reserve requirements of the Raisin Order. The All further found that Mr. Horne and partners violated the AMAA and the Raisin Order by failing to obtain inspections of acquired incoming raisins, failing to hold requisite tonnages of raisins in reserve, failing to file accurate reports, failing to allow access to their records, and failing to pay requisite assessments.

The ALJ concluded that the Farmer-to-Consumer Direct Marketing Act of 1976 does not exempt farmers/producers who act as handlers from regulation under federal marketing orders. The ALJ further concluded that the violations by Mr. Horne and partners require the entry of an order directing them to pay the RAC assessments they have failed to pay and to pay the RAC the dollar equivalent of the raisins they failed to hold in reserve. Moreover, the

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[2] In this Decision and Order, I refer to these respondents, as well as the partnership Raisin Valley Farms, as "Mr. Horne and partners" unless clarity dictates otherwise.

All concluded that the violations were deliberate and were designed to obtain an unfair competitive advantage over other California raisin handlers who were in compliance with the Raisin Order. Pursuant to 7 U.S.C. § 608414)(B), the ALJ assessed Mr. Horne and partners a $731,500 civil penalty and ordered payment of $523,037 for the dollar equivalent of raisins not held in reserve and $9,389.73 for owed assessments.

On January 4, 2007, Marvin D. Horne and Laura R. Horne, d/b/a Raisin Valley Farms, and Marvin D. Horne, Laura R. Horne, and Don Durbahn, a partnership, d/b/a Lassen Vineyards, filed a timely petition for review of the ALJ's Decision and Order and requested oral argument before the Judicial Officer. The request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit (7 C.F.R. § 1.145(d)), is refused because the issues have been fully briefed; thus, oral argument would appear to serve no useful purpose.

DECISION

Findings of Fact

Marvin D. Horne has been a farmer since 1969. Mr. Horne and his wife Laura R. Horne grow Thompson seedless grapes for raisins. Their grape-growing and raisin-producing activities operate under the registered trademark "Raisin Valley Farms." Raisin Valley Farms is one of the largest operations in the California valley where most of the world's raisins are produced (Tr. I at 868-69). Marvin D. Horne and Laura R. Horne also do business as Raisin Valley Farms Marketing Association (also known as Raisin Valley Marketing).

Both Raisin Valley Farms and Raisin Valley Farms Marketing Association have the same business mailing address in Kerman, California. (Tr. I at 873-74.)

During the 2002-2003 and 2003-2004 crop years, Marvin D. Horne and Laura R. Horne also operated a partnership with Laura's father, Don Durbahn, and Laura's mother, Rena Durbahn (now deceased). This partnership did business and continues to do business, as Lassen Vineyards, also in Kerman, California. Prior to 2002, Lassen Vineyards was exclusively a farming partnership that produced Thompson seedless grapes made into raisins (Tr. I at 870). In 2002, Lassen Vineyards started operating raisin packing plant equipment at the Kerman, California, location (Tr. I at 871-73).

In 1998, Marvin D. Horne and Laura R. Horne expressed an interest to the RAC about acting as a handler of California raisins under the Raisin Order (CX 94). In 1999, Marvin D. Horne and Laura R. Horne filed a fictitious name certificate in the Fresno (California) County Clerk's Office in which they adopted the name "Raisin Valley Farms" (CX 95, CX 96). Then, for crop years 2001-2002, 2002-2003, and 2003-2004, Mr. and Mrs. Horne, under the Raisin Valley Farms' name, filed RAC-5 forms, notifying the RAC of their intention to handle raisins as a packer under the Raisin Order (CX 98, CX 100, CX 102). During this time-frame, Mr. Horne served 6 years as an alternate member of the RAC (Tr. I at 175; CX 103, CX 104).

Lassen Vineyards is a partnership formed in 1995 by Marvin D. Horne, Laura R. Horne, Don Durbahn, and the late Rena Durbahn. The partnership was

created "to engaged [sic] in farming and any other farming related business." (RX 12 at 1.) The partnership owned land in Kerman, California, where it produced raisins and operated a raisin packing plant. Don Durbahn and Marvin A. Horne, Mr. and Mrs. Marvin D. Horne's son, supervised the packing activities at Lassen Vineyards (Tr. I at 879-80). The workers who performed the packing activities at Lassen Vineyards were "leased employees" who were leased to Lassen Vineyards by a partnership of Laura R. Horne and Rena Durbahn (Tr. I at 933-34).

In crop years 2002-2003 and 2003-2004, Lassen Vineyards operated the packing plant to process (i.e., to stem, sort, clean, grade, and package) California raisins for themselves and, for a fee, for other raisin producers (Tr. I at 962; Tr. II at 25-27). During this time, Lassen Vineyards charged producers 12 cents per pound to pack raisins and $5 for each pallet upon which the boxed raisins were stacked (Tr. II at 28, 44). The cost for labor and packaging materials was included in the fee charged (Tr. II at 30-31, 44, 48). All raisins packed by Lassen Vineyards in crop years 2002-2003 and 2003-2004 were packaged in boxes stamped with the handler number 94-101. That number had been assigned to Marvin D. Horne and Laura R. Horne (Tr. I at 964-65). When questioned, Mr. Horne indicated that the difference between Lassen Vineyards and a toll packer was that the packed product could leave Lassen Vineyards without the farmer being required to pay fees up front (Tr. I at 979).

On numerous occasions, Mr. Horne exchanged communications with the United States Department

of Agriculture and the RAC concerning the Raisin Order, including his responsibilities under the Raisin Order (CX 94, CX 105-CX 110; RX 91-RX 103, RX 105-RX 125, RX 127-RX 149). On March 15, 2001, Marvin D. Horne and Laura R. Horne, through their then attorney, wrote to the Secretary of Agriculture and asked whether the obligations of the Raisin Order regarding volume regulation, quality control, payment of assessments to the RAC, and reporting requirements would apply if Raisin Valley Farms had its raisins "custom packed" by a packer that would not take title to Raisin Valley Farms' raisins (RX 95). On April 23, 2001, the Deputy Administrator, Fruit and Vegetable Programs, United States Department of Agriculture, explained that under the scenario presented, Raisin Valley Farms would be neither a packer nor a handler, but that the custom packer would be both a packer and a handler. The Deputy Administer further explained that the custom packer "acquired" the raisins because it obtained physical possession of the raisins at a packing or processing plant. (7 C.F.R. § 989.17.) Furthermore, the custom packer would be "required to meet the order's obligations regarding volume regulation, quality control, payment of assessments to the Raisin Administrative Committee (RAC), and reporting requirements." (RX 98.) The Deputy Administrator also provided Mr. Horne with portions of the 1949 proposed rule making and rule making hearing testimony discussing the treatment of this activity under the Raisin Order. The testimony establishes that the Raisin Order was intended to treat such custom packers (also called toll packers) as handlers (RX 98).

In a number of these communications, the Agricultural Marketing Service clearly informed Mr. Horne that his proposed activities would make him a handler subject to the Raisin Order. In a January 18, 2002, letter, Maureen T. Pello, Senior Marketing Specialist in the Fresno, California, Field Office of the Agricultural Marketing Service, told Mr. Horne that his proposed activities would make him a handler under the Raisin Order.

> As we discussed, based upon your description of your proposed activities, you would be considered a handler under the Federal marketing order for California raisins (order). As a handler, you would be required to meet all of the order's regulations regarding volume control, quality control (which includes incoming and outgoing inspection), assessments, and reporting to the Raisin Administrative Committee (RAC).

RX 100. On May 20, 2002, the Administrator responding to an e-mail and a letter sent by Mr. Horne stated:

> You indicate in your correspondence that you plan to pack and market your own raisins. Such activities would make you a handler under the order. As a handler, you would be required to meet all of the order's regulations regarding volume control, quality control (incoming and outgoing inspection), assessments, and reporting to the RAC.

RX 101. Marvin D. Horne expressly disregarded the United States Department of Agriculture's interpretations of the terms of the Raisin Order that he requested. Mr. Horne did not use the custom packing firm to process his raisins, but rather, he elected to establish a family-owned packing operation at Lassen Vineyards where he packed raisins for his family, and, for a fee, Lassen Vineyards packed raisins for other growers (Tr. I at 977-78). Contrary to the advice Mr. Horne received from the United States Department of Agriculture, Lassen Vineyards did not pay any assessments, did not have any incoming inspections performed, did not file accurate reports, and did not hold any raisins in reserve with respect to any of the raisins Lassen Vineyards received from and packed for growers during the 2002-2003 and 2003-2004 crop years (Tr. I at 965-73).

During crop years 2002-2003 and 2003-2004, Mr. and Mrs. Horne also operated an unincorporated grower association named "Raisin Valley Farms Marketing Association." Mr. and Mrs. Horne created Raisin Valley Farms Marketing Association to "attract the market of buyers." (Tr. I at 876.) Sixty raisin growers were members of Raisin Valley Farms Marketing Association (Tr. II at 55). Membership in Raisin Valley Farms Marketing Association allowed the raisin growers to market their raisins under the Hornes' trade name "Raisin Valley Farms" (Tr. I at 874-78).

When a Raisin Valley Farms Marketing Association member sold raisins through the Raisin Valley Farms Marketing Association, the association collected the purchase price from the buyer and

deducted Lassen Vineyards' fee for the packing services as well as an accounting fee for Raisin Valley Farms Marketing Association and a contribution for a fund to protect members from customers who fail to pay. If the sale was negotiated through a broker, Raisin Valley Farms Marketing Association deducted a brokerage fee. After all the deductions were taken, Raisin Valley Farms Marketing Association remitted the balance to the grower. (Tr. II at 50-52.) Mr. Horne acknowledged that Lassen Vineyards benefitted from the fees it received from Raisin Valley Farms Marketing Association members (Tr. II at 52).

When Raisin Valley Farms Marketing Association received an order for raisins, Mr. Horne contacted one of the Raisin Valley Farms Marketing Association members inquiring if the member would accept the price offered. When Mr. Horne found a grower willing to accept the order, he told that grower when to bring the raisins to Lassen Vineyards' packing plant to be stemmed, sorted, cleaned, graded, and packaged (Tr. II at 55-57). The buyer picked up the packaged raisins and left a bill of lading. When the buyer paid for the raisins, Mr. Horne deposited the funds into an account. Originally, the funds were deposited into an account in the name of Mr. and Mrs. Horne. Mr. Horne changed the account to one named "Raisin Valley Farms Marketing, LLT." Now, Raisin Valley Farms Marketing Association has "a bone fide Association bank account" from which Mr. Horne, for Raisin Valley Farms Marketing Association, disburses funds to Lassen Vineyards, the brokers, and the growers. (Tr. II at 58-60.)

On or about August 22, 2002, Marvin Horne, on behalf of Raisin Valley Farms, submitted an inaccurate RAC-1 Form, Weekly Report of Standard Raisin Acquisitions, to the RAC. Mr. Horne reported to the RAC that Raisin Valley Farms did not acquire any California raisins during the week ending August 3, 2002. (CX 62.) However, the record evidence shows that Raisin Valley Farms acquired more than 95,000 pounds of California raisins during this time period (CX 1, CX 2).

From September 5, 2003, to December 2, 2003, Laura Horne and/or Marvin Horne, on behalf of Raisin Valley Farms, submitted 13 inaccurate RAC-1 Forms, Weekly Report of Standard Raisin Acquisitions, to the RAC.[3] The Hornes reported to the RAC that they did not acquire any California raisins during this time period (CX 63-CX 75). However, the record evidence leads to the conclusion that they acquired substantial amounts of California raisins during this time period (CX 3-CX 56).

From August 1, 2003, to November 30, 2003, Marvin Horne, on behalf of Raisin Valley Farms, submitted four inaccurate RAC-20 Forms, Monthly Reports of Free Tonnage Raisin Disposition, to the RAC (CX 76-CX 79). Mr. Horne reported to the RAC that he did not ship or dispose of any California raisins during this time period. However, the record evidence shows that Raisin Valley Farms shipped

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[3] Each of the forms has the number "59" written on the upper left of the form. The number "59" is a packer number assigned by RAC for internal control (Tr. I at 189). In addition, each form has "Raisin Valley Farms" shown as the originating fax machine identifier (CX 63-CX 75).

substantial amounts of California raisins during this time period (CX 3-CX 56, CX 247-CX 273).

During crop year 2002-2003, Marvin Horne, on behalf of Raisin Valley Farms, submitted an inaccurate RAC-50 Form, Inventory of Free Tonnage Standard Quality Raisins on Hand, to the RAC (CX 80). Mr. Horne reported to the RAC that Raisin Valley Farms did not have any California raisin inventories during this time period. However, the record evidence shows Raisin Valley Farms had inventories of California raisins in that Raisin Valley Farms was shipping substantial amounts of California raisins during this time period (CX 82-CX 87).

During crop year 2002-2003, Marvin Horne, on behalf of Raisin Valley Farms, submitted an inaccurate RAC-51 Form, Inventory of Off-Grade Raisins on Hand, to the RAC (CX 81). Mr. Horne reported to the RAC that Raisin Valley Farms did not have any California raisin inventories during this time period. However, the record evidence shows Raisin Valley Farms had inventories of California raisins in that Raisin Valley Farms was shipping substantial amounts of California raisins during this time period (CX 1, CX 2, CX 81-CX 87).

During crop year 2002-2003, Mr. Horne and partners failed to obtain incoming inspections of California raisins on at least six occasions (CX 82-CX 87; Tr. I at 966-67).[4]

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[4] The record does not contain direct evidence that Mr. Horne and partners "received" raisins but there is ample evidence that they "packed-out" raisins (CX 82-CX 87). Logic allows me to conclude that raisins cannot be "packed-out" unless they are

During crop year 2003-2004, Mr. Horne and partners failed to obtain incoming inspections of California raisins on at least 52 occasions (CX 3-CX 54, CX 56; Tr. I at 966-67).

During crop year 2002-2003, Mr. Horne and partners failed to hold in reserve for 294 days approximately 49,350 pounds of California Natural Sun-dried Seedless raisins (CX 82-CX 87, CX 88 at 2, CX 92 at 6). The producer price for raisins was $394.85 per ton (CX 161 at 3). Therefore, for the 2002-2003 crop year, Mr. Horne and partners failed to pay $9,742.93 to the RAC for compensation for failing to deliver any reserve raisins to the RAC.

During crop year 2003-2004, Mr. Horne and partners failed to hold in reserve for 298 days approximately 611,159 pounds of California Natural Sun-Dried Seedless raisins (CX 3-CX 56, CX 161). The producer price for raisins was $567 per ton (71 Fed. Reg. 29,565, 29,569 (May 23, 2006)). Therefore, for the 2003-2004 crop year, Mr. Horne and partners failed to pay $173,263.58 to the RAC for compensation for failing to deliver any reserve raisins to the RAC. For this crop year, the RAC issued two demand letters to the respondents to deliver reserve California raisins or to pay the dollar equivalent (RX 136, RX 137).

During crop year 2002-2003, Mr. Horne and partners failed to pay assessments to the RAC of

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received. Combine that conclusion with Mr. Horne's testimony that incoming inspections were not obtained leads to the holding that Mr. Horne and partners violated the Raisin Order by not obtaining incoming inspections on the raisins. (Tr. I at 966-67.)

approximately $222.60. During crop year 2003-2004, Mr. Horne and partners failed to pay assessments to the RAC of approximately $5,819.63.

Mr. Horne and partners failed to allow access to their records to the United States Department of Agriculture (CX 154; Tr. I at 422-24).

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.

2. On August 3, 2002, the respondents violated section 989.73(b) of the Raisin Order (7 C.F.R. § 989.73(b)) by submitting an inaccurate RAC-1 Form, Weekly Report of Standard Raisin Acquisitions, to the RAC.

3. From August 1, 2003, to November 30, 2003, the respondents violated section 989.73(b) of the Raisin Order (7 C.F.R. § 989.73(b)) by submitting 13 inaccurate RAC-1 Forms, Weekly Reports of Standard Raisin Acquisitions, to the RAC.

4. From August 1, 2003, to November 30, 2003, the respondents violated section 989.73(d) of the Raisin Order (7 C.F.R. § 989.73(d)) by submitting four inaccurate RAC-20 Forms, Monthly Reports of Free Tonnage Raisin Disposition, to the RAC.

5. The respondents violated section 989.73(a) of the Raisin Order (7 C.F.R. § 989.73(a)) by filing an inaccurate RAC-50 Form, Inventory of Free Tonnage Standard Quality Raisins on Hand, to the RAC for crop year 2002-2003.

6. The respondents violated section 989.73(a) of the Raisin Order (7 C.F.R. § 989.73(a)) by filing an inaccurate RAC-51 Form, Inventory of Off-Grade

Raisins on Hand, to the RAC for crop year 2002-2003.

7. The respondents violated section 989.58(d) of the Raisin Order (7 C.F.R. § 989.58(d)) by failing to obtain incoming inspections of California raisins on at least six occasions during crop year 2002-2003.

8. The respondents violated section 989.58(d) of the Raisin Order (7 C.F.R. § 989.58(d)) by failing to obtain incoming inspections of California raisins on 52 occasions during crop year 2003-2004.

9. The respondents violated sections 989.66 and 989.166 of the Raisin Order (7 C.F.R. §§ 989.66, .166) by failing to hold in reserve for 294 days approximately 49,350 pounds of California Natural Sun-dried Seedless raisins and by failing to pay to the RAC $9,742.93, the dollar equivalent of the California raisins that were not held in reserve for crop year 2002-2003.

10. The respondents violated sections 989.66 and 989.166 of the Raisin Order (7 C.F.R. §§ 989,66, .166) by failing to hold in reserve for 298 days approximately 611,159 pounds of California Natural Sun-Dried Seedless raisins and by failing to pay to the RAC $173,263.58, the dollar equivalent of the California raisins that were not held in reserve for crop year 2003-2004.

11. The respondents violated section 989.80 of the Raisin Order (7 C.F.R. § 989.80) by failing to pay assessments to the RAC of approximately $222.60 for crop year 2002-2003.

12. The respondents violated section 989.80 of the Raisin Order (7 C.F.R. § 989.80) by failing to pay

assessments to the RAC of approximately $5,819.63 for crop year 2003-2004.

13. The respondents violated section 989.77 of the Raisin Order (7 C.F.R. § 989.77) by failing to allow access to their records to the United States Department of Agriculture.

Discussion

The handling of California raisins is subject to the requirements of the Raisin Order that resulted from a request of the California raisin industry. The industry made the request to the Secretary of Agriculture pursuant to the AMAA.

In response to the request for a marketing order, the United States Department of Agriculture held a hearing in Fresno, California, on December 13-16, 1948. Based on the evidence received at the hearing, a decision was issued that recommended the promulgation of the Raisin Order. The recommendation included a rational basis for issuance of the Raisin Order and for its various provisions (14 Fed. Reg. 3083 (June 8, 1949)). Interested parties were given an opportunity to file written exceptions to the recommended decision. *Ibid.* Upon consideration of the exceptions that were filed and the record evidence presented at the hearing, the Secretary of Agriculture, on July 8, 1949, found that the issuance of the Raisin Order, as set forth in the recommended decision, would effectuate the declared policy of the AMAA and ordered that a referendum be conducted among producers of raisin variety grapes grown in California to determine whether at least two-thirds of them favored its issuance (14 Fed. Reg. 3858, 3868

(July 13, 1949)). The referendum was conducted and the requisite percentage of producers was found to favor the Raisin Order's terms and provisions. Those terms and provisions, as periodically amended through subsequent rulemaking proceedings, were fully applicable and governed the handling of California raisins during the 2002-2003 and 2003-2004 crop years when Mr. Horne and partners acted as first handlers of raisins.

Mr. Horne and partners raised 12 issues in their appeal. In issue 12, Mr. Horne and partners contend the ALJ erroneously allowed the Administrator to add parties after the hearing was substantially completed.

Ordinarily, leave to amend should be freely given in the absence of prejudice to the opposing party. *Waits v. Weller*, 653 F.2d 1288, 1290 (9th Cir. 1981), citing *Wyshak v. City National Bank*, 607 F.2d 824, 826 (9th Cir. 1979). However, the issue of amending a complaint by adding an additional party after the initial hearing raises concerns. The decision to amend a complaint is within the discretion of the trial judge, keeping in mind the strong policy in favor of allowing amendment, and considering four factors: (1) bad faith, (2) undue delay, (3) prejudice to the opposing party, and (4) the futility of amendment. *Kaplan v. Rose*, 49 F.3d 1363, 1370 (9th Cir. 1994), *cert. denied*, 516 U.S. 810 (1995), citing *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987). Mr. Horne and partners, in their appeal, did not raise bad faith, delay, or futility as reasons for denying the amendments. Therefore, those issues are not before me.

Prejudice is the most important factor when determining if an amendment should be allowed. *Zeneth Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330-31 (1971). The amendment of a complaint should be denied when a party suffers "undue prejudice" because of the amendment. *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1430 (7th Cir. 1993). The determination whether there is sufficient prejudice to justify denying an amendment requires a balancing of the interests of the parties. The balancing

> entails an inquiry into the hardship to the moving party if leave to amend is denied, the reasons for the moving party failing to include the material in the original pleading, and the injustice resulting to the party opposing the motion should it be granted.

6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1487 at 621-23 (2d ed. 1990).

For the reasons set forth below, I decline to reverse the All's decision to allow the Administrator to amend the Complaint and add additional parties. First, and foremost, the decision to allow an amendment of a complaint lies within the discretion of the ALI Absent evidence that the All abused that discretion, the decision should stand. Mr. Horne and partners presented no argument to convince me that the All abused his discretion. Furthermore, my own examination of the record convinces me that the ALJ's decision to allow the Administrator to add parties was correct.

The following transcript passage from Mr. Horne's counsel's opening statement at the hearing on February 9, 2005, shows Mr. Horne was warned about the possibility of the amendment.

> MR. DOMINA: Now, I want to return to the entities for just this brief moment. Lasson [sic] Vineyards, the partnership that consists of these two folks and Mrs. Horne's parents, own this pack-line. They own the equipment inside this partnership, a California general partnership Lasson [sic] Vineyards, that partnership is a stranger to this case. Lasson [sic] Vineyards—
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> ADMINISTRATIVE [LAW] JUDGE PALMER: I might give you a word of warning. I recall some decisions by the Judicial Officer, past decisions, reviewing our decisions, not mine particularly, but saying that you can amend these complaints as you go along and they may well amend it to include them.
>
> MR. DOMINA: I'm aware of those decisions and I appreciate your comment.

Tr. I at 58-59. Furthermore, in the order authorizing the amendment to the Complaint adding parties, the ALJ made clear that "the new parties will be given the opportunity to present any evidence they believe is necessary to fully defend themselves from the amended complaint's allegations." (August 3, 2005, Order Authorizing Amendment of the Complaint To Conform To the Evidence.) The ALJ held five teleconferences with counsel between February 2006

and the hearing on May 23, 2006. At these teleconferences, the ALJ sorted out evidence, issues, and witness lists, issued subpoenas, and moved the hearing location at the request of Mr. Horne's counsel. On the morning of the hearing, additional off-the-record conferences resolved many of the issues prior to the hearing. On the afternoon of May 23, 2006, the All presided over a hearing. Mr. Horne was the primary witness. At the conclusion of the hearing, there was no claim that the added parties needed more time to present their evidence (Tr. II at 261).

Although Mr. Horne and partners argue that the addition of the new parties should not have been allowed after the initial hearing, they must take significant responsibility for the Administrator's inability to identify all appropriate parties. On May 21, 2004, the ALJ set the date for the hearing as February 8-17, 2005, and ordered an exchange of witness lists, exhibit lists, and copies of exhibits. The ALJ ordered the Administrator to provide his documents by October 4, 2004. The Administrator filed his documents on September 20, 2004. The order also called for Mr. Horne and partners to provide their documents on November 15, 2004. The All extended that deadline until December 15, 2004. The record does not indicate that Mr. Horne and partners provided the documents in a timely fashion. On January 3, 2005, Mr. Horne was served with a subpoena duces tecum (CX 164) seeking records regarding his raisin operations. In response, Mr. Horne provided hearing exhibits RX 1-RX 152. Mr. Horne admitted he did not fully comply with the

subpoena.[5] (Tr. I at 947.) Without Mr. Horne's records, the Administrator's inability to identify all the various intermingled entities involved in Mr. Horne's raisin operations before the initial hearing, is understandable.

Mr. Horne's business structure is confusing at best. There appear to be three main entities, Raisin Valley Farms, Lassen Vineyards, and Raisin Valley Farms Marketing Association. The main problem is that at various times Mr. Horne uses the name "Raisin Valley Farms" for each. Without Mr. Horne's personal knowledge, it is impossible to know which bank account in the name of Raisin Valley Farms is the account for which company. In fact, there was not a bank account in the name of Lassen Vineyards. (Tr. II at 58-60, 123-24.)

Raisin Valley Farms is a partnership between Marvin D. Horne and his wife Laura (Tr. I at 868). Mr. Horne grows grapes and makes raisins under the Raisin Valley Farms name. The Raisin Valley Farms name is trademarked. (Tr. I at 869.) Lassen Vineyards is a partnership between Marvin Horne, his wife Laura, and his father-in-law Don Durbahn.[6] (Tr. I at 869-70; RX 12.) Lassen Vineyards began as a farming operation, growing grapes and making raisins, adding a raisin packing facility on its property in 2002 (Tr. I at 870-71).

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[5] I note that in November 2002, the Agricultural Marketing Service issued an investigative subpoena seeking Mr. Horne's records (CX 154). Mr. Horne "refuse[d] to produce any records" sought by the investigative subpoena (RX 106; Tr. I at 432).

[6] The partnership also included Laura Horne's mother Rena Durbahn until Mrs. Durbahn passed away.

Another issue raised on appeal is Mr. Horne and partners' position that the Farmer-to-Consumer Direct Marketing Act of 1976 (7 U.S.C. §§ 3001-3006) exempts them from handler obligations under the Raisin Order because they were attempting to promote the policy of that statute. The ALJ found this argument "patently specious" and I agree. The Farmer-to-Consumer Direct Marketing Act does not exempt raisin producers from the requirements of the Raisin Order.

Furthermore, the type of activity that the Farmer-to-Consumer Direct Marketing Act sought to encourage was the farmers market where farmer and consumer could come together directly and avoid middlemen. Mr. Horne and partners presented no evidence that their activities, in fact, supported the goals of the Farmer-to-Consumer Direct Marketing Act. Mr. Horne and partners sold raisins in wholesale packaging and quantities, frequently to candy makers and other food processors as ingredients for other food products. Mr. Horne showed no connection between his business activities and the goals of the Farmer-to-Consumer Direct Marketing Act. Therefore, even if the Farmer-to-Consumer Direct Marketing Act exempted raisin producers from the mandates of the Raisin Order — which it does not — Mr. Horne and partners failed to demonstrate compliance with the goals of the Farmer-to-Consumer Direct Marketing Act.

In their appeal, Mr. Horne and partners question the constitutionally of the Raisin Order. First and foremost, I have no authority to judge the constitutionality of the various statutes administered by the United States Department of Agriculture.

Califano v. Sanders, 430 U.S. 99, 109 (1977) ("Constitutional questions obviously are unsuited to resolution in administrative hearing procedures"); *Robinson v. United States*, 718 F.2d 336, 338 (10th Cir. 1983) ("The agency is an inappropriate forum for determining whether its governing statute is constitutional"). Therefore, Mr. Horne and partners questioning of the constitutionality of the Raisin Order falls on legally deaf ears. I need not point out to Mr. Horne and partners that the Court of Federal Claims recently found the arguments made in this appeal to be unavailing. *Evans v. United States*, 74 Fed. Cl. 554 (2006). The United States Court of Appeals for the Federal Circuit affirmed the Court of Federal Claims Decision, 250 F. App'x 231 (2007), and the Supreme Court of the United States denied a petition for certiorari, 128 S. Ct. 1292 (2008). Until the appropriate court instructs me otherwise, I will treat the Raisin Order as constitutional, as I believe it to be.[7]

The Raisin Order's provisions apply to "handlers" who "first handle" raisins. A "handler" is defined in the raisin marketing order to include "any processor or packer" (7 C.F.R. § 989.15). A "packer" is defined as "any person who, within the area, stems, sorts, cleans, or seeds raisins, grades stemmed raisins, or

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[7] Mr. Horne and partners suggest, at page 29 ¶ 102 of Respondents' Opening Brief On Appeal to Judicial Officer, USDA [hereinafter Respondents' Appeal Brief], that I might consider a "Rule 15(c)" proceeding the appropriate forum in which to address their constitutional argument. I need not address that question because, considering the results of the *Evans* case, conducting a "Rule 15(c)" proceeding would not alter the results.

packages raisins for market as raisins" (7 C.F.R. § 989.14). A handler becomes a "first handler" when he "acquires" raisins, a term specifically and plainly defined by the Raisin Order:

> **§ 989.17 Acquire.**
>
> *Acquire* means to have or obtain physical possession of raisins by a handler at his packing or processing plant or at any other established receiving station operated by him: . . . *Provided further*, That the term shall apply only to the handler who first acquires raisins.

7 C.F.R. § 989.17.

The record demonstrates that Mr. Horne and partners, in their operation of the packing house known as Lassen Vineyards, came within each of these definitions during crop years 2002-2003 and 2003-2004. As such, they were required as a handler to: (1) cause an inspection and certification to be made of all natural condition raisins acquired or received (7 C.F.R. § 989.58(d)); (2) hold in storage all acquired reserve tonnage as established by the controlling reserve tonnage regulation (7 C.F.R. §§ 989.66, .166); (3) file certified reports showing: inventory, acquisition, and other information required by the RAC to enable it to perform its duties (7 C.F.R. § 989.73); (4) allow the RAC access to inspect the premises, the raisins held, and all records for the purposes of checking and verifying reports filed (7 C.F.R. § 989.77); and (5) pay assessments to the RAC with respect to free tonnage acquired and any reserve tonnage released or sold for use in free tonnage outlets (7 C.F.R. § 989.80).

Mr. Horne and partners' arguments that they did not acquire raisins are unavailing in light of the plain meaning of the language of the Raisin Order defining the term "acquire." Moreover, if there were any ambiguity, the interpretation given by the United States Department of Agriculture both at the time of the issuance of the Raisin Order and in subsequent correspondence with the Hornes, is clear, straightforward, of long-standing, and controlling. *See Barnhart v. Walton*, 535 U.S. 212 (2002); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The 1949 recommended decision, which was adopted as part of the Secretary of Agriculture's final decision, explained the language employed and clarified that:

> The term "acquire" should mean to obtain possession of raisins by the first handler thereof. The significance of the term "acquire" should be considered in light of the definition of "handler" (and related definitions of "packer" and "processor"), in that the regulatory features of the order would apply to any handler who acquires raisins. Regulation should take place at the point in the marketing channel where a handler first obtains possession of raisins, so that the regulatory provisions of the order concerning the handling of raisins would apply only once to the same raisins. Numerous ways by which handlers might acquire raisins were proposed for inclusion in the definition of the term, the objective being to make sure

> that all raisins coming within the scope of handlers' functions were covered and, conversely, to prevent a way being available whereby a portion of the raisins handled in the area would not be covered. Some of the ways by which a handler might obtain possession of raisins include: (i) Receiving them from producers, dehydrators, or others, whether by purchase, contract, or by arrangement for toll packing, or packing for a cash consideration[.]

14 Fed. Reg. 3083, 3086 (June 8, 1949).

This interpretation is consistent with testimony at the hearing conducted to consider the need of the raisin industry for a marketing order and its appropriate terms:

> Q Mr. Hoak, suppose a packer stems, cleans, and performs other operations connected with the processing of raisins for a producer and then the producer sells the raisins to another packer. Under this proposal, which person should be required to set the raisins aside?
>
> A The man who performs the packing operation, who is the packer.
>
> Q Mr. Hoak, I believe that you have testified earlier that the term "packer" should include a toll packer. By that do you mean that it should include a person who takes raisins for someone else for a fee?
>
> A That is right.

> Q Also, did I understand you to say that that person should be the one who would be required to set aside or establish the pools under the regulatory provisions?
>
> A That is right. He is the man who would be held responsible for setting aside the required amount of raisins.
>
> Q I take it that that man would not have title to any raisins insofar as he is a toll packer; is that correct?
>
> A That is right.

ALJ Decision and Order, App. A.

These excerpts from the recommended decision and the hearing transcript were sent to an attorney representing Mr. and Mrs. Horne on April 23, 2001. Apparently, they believe their personal interpretation of the term "acquire" as used in the Raisin Order should take precedence over the plain language of the Raisin Order and the interpretation of its meaning that was conveyed to them by the United States Department of Agriculture. The decision of Mr. Horne and partners not to follow the United States Department of Agriculture's interpretative advice, and, instead, to play a kind of shell game with interlocking partnerships and a marketing association to try to conceal their role as first handler, only shows that they acted willfully and intentionally when they decided not to file accurate reports, not to hold raisins in reserve, not to have incoming raisins inspected, not to pay assessments, and not to allow inspection of their records for verification purposes.

In simple terms, Mr. Horne and partners, as a matter of law, acquired raisins, as first handlers, when raisins arrived at the processing/packing facility known as Lassen Vineyards. Their arguments that title to the raisins never transferred from the grower to Mr. Horne and partners under California law is unavailing. California law does not control, the Raisin Order does. Under the Raisin Order, the term "acquire" is a term of art that does not encompass an ownership interest but rather physical possession. Mr. Horne and partners obtained physical possession of — thus they "acquired" — raisins when a grower brought raisins to the facility.

I also must address Mr. Horne and partners' position that they did not process the raisins but merely leased equipment to producers who processed their own raisins. The argument defies common sense. Mr. Horne and partners own raisin processing equipment. Growers bring raisins to the facility for processing. The grower pays Mr. Horne and partners for use of the equipment not by the hour or day like most equipment leases but by the pound, i.e., the amount of product processed. That price includes supervision of the equipment by Mr. Horne's son, whose salary is paid by the partnership. The price also includes other workers who are provided by a different, but interlocking, partnership consisting of two members of the Lassen Vineyards partnership, Mr. Horne's wife and mother-in-law. In addition, the "lease" price also includes all packing material (on which Mr. Horne's handler number has been imprinted). Furthermore, the grower "leasing" the equipment need not stay at the facility during the use of the equipment but can leave the location

allowing Lassen Vineyards' employees to supervise the processing. Mr. Horne and partners can call what they do a "lease" or anything else they might want to call it, but the reality is that Mr. Horne and partners are processing/handling raisins.

Mr. Horne and partners argue the ALJ erred by failing to use a higher standard of proof than preponderance of the evidence (Respondents' Appeal Brief at 32-35). Reviewing their earlier filings before the ALJ, I found no suggestion to the ALJ that a higher standard of proof should be utilized. Absent such a suggestion to the ALJ, I am reluctant to reverse the ALJ's use of the preponderance of the evidence standard. However, to satisfy myself that the appropriate standard was applied, I reviewed the argument. I found the argument significantly lacking. While there are proceedings in which a greater standard is appropriate,[8] this proceeding is not one of them. Mr. Horne and partners did not demonstrate that a standard of proof higher than the preponderance of the evidence standard was appropriate. Therefore, I hold that the ALJ's use of the preponderance of the evidence standard was not error.

Mr. Horne and partners also argue the Administrator failed to meet his burden to prove the case by a preponderance of the evidence.[9] I disagree.

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[8] See, e.g., *Santosky v. Kramer*, 455 U.S. 745 (1982) (proceeding to terminate parental rights); *Addington v. Texas*, 441 U.S. 418 (1979) (involuntary commitment proceeding); *Woodby v. INS*, 385 U.S. 276 (1966) (deportation).

[9] Preponderance of evidence. Evidence which is of greater weight or more convincing than the evidence which is offered in

I do not provide a laundry list of "fact[s] sought to be proved," but I note that I read the entire transcript and examined the evidence. The greater weight of that evidence leaves me with but one conclusion which is that Marvin Horne and partners put in place a scheme to enhance their profitability by avoiding the requirements of the Raisin Order. By so doing, they obtained an unfair competitive advantage over everyone in the raisin industry who complied with the Raisin Order.

The Administrator alleges that Mr. Horne and partners violated section 989.77 of the Raisin Order (7 C.F.R. § 989.77) "by failing to allow access to their records to the U.S. Department of Agriculture, even after being served with two subpoenas for such access." (Second Amended Compl. at 5 ¶ 12.) Mr. Horne and partners deny this allegation stating "[t]here was no evidence of noncompliance with subpoenas, information requests, or failure to fully comply with Government requests for data." (Respondents' Appeal Brief at 30 ¶ 104.) The record belies that claim showing that Mr. Horne failed to allow access as required by section 989.77 of the Raisin Order (7 C.F.R. § 989.77).

The Raisin Order makes clear that handlers shall provide access to their facilities and records, as follows:

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opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not [citation omitted]. With respect to burden of proof in civil actions, means greater weight of evidence, or evidence which is more credible and convincing to the mind. That which best accords with reason and probability. Black's Law Dictionary 1064 (5th ed. 1979).

§ 989.77 Verification of reports and records.

> **For the purpose of checking and verifying reports filed by handlers and records prescribed in or pursuant to this amended subpart, the committee, through its duly authorized representatives, shall have access to any handler's premises during regular business hours and shall be permitted at any such times to inspect such premises and any raisins held by such handler, and any and all records of the handler with respect to the holding or disposition of raisins by him and promotion and advertising activities conducted by handlers under § 989.53.**

7 C.F.R. § 989.77.

On August 29, 2001, Maria Martinez Esguerra, a compliance officer for the Agricultural Marketing Service in the Fresno, California, office, was assigned to investigate whether Mr. Horne was packing and shipping raisins without obtaining inspections (Tr. I at 420). During the course of her investigation, Ms. Esguerra met with Mr. Horne and asked to review his raisin production, acquisition, sales, and disposition records (Tr. 1 at 421). Mr. Horne told Ms. Esguerra "that he would not release any information without a subpoena." (Tr. I at 421.)

Ms. Esguerra's testimony continued:

> On May 14 I had prepared a subpoena, a request for a subpoena for the administrator. But my declaration here also stated basically in my conversation or interview with Mr. Horne to which he

had admitted to me that he produced and packed organic raisins during the crop years 2000 and 2001.

There were other questions that I had asked, and I'd asked him about if he had packed organic raisins in cellophane bags and he said he did. In fact he even showed us the sizes of those cello packaged raisins.

They were in sizes 16 ounces, 8 ounce and 1.5 ounces. However, he disclosed to, he did he refused to disclose any more information regarding his sales.

He has raisin production and acquisition records, and sales and dispositions, but again he said he would not release any information without a subpoena.

Following that we had a subpoena prepared, and on November 26 I receive that, and I subsequently served it to Mr. Horne on that same day.

On December 9, I went back to the house of Marvin Horne on Modoc Avenue pursuant to that subpoena, and I asked if I could speak with him and he met me at the door. He told me why he will not produce any records for me to review.

Tr. I at 421-23. Ms. Esguerra was asked: "After you served Mr. Horne with the subpoena, did he produce any records?" She responded: "No, he did not." (Tr. I at 423-24.)

Ms. Esguerra's testimony demonstrates that she sought access to Mr. Horne and partners' records which she is authorized to do under the Raisin Order. Mr. Horne refused unless Ms. Esguerra obtained a subpoena. Even though a subpoena is not required under the Raisin Order, Ms. Esguerra obtained one (CX 154). When she presented the subpoena to Mr. Horn; he still refused to comply with the Raisin Order and give her access to the records. Therefore, I conclude Mr. Horne and partners violated section 989.77 of the Raisin Order (7 C.F.R. § 989.77) by refusing to provide Ms. Esguerra access to their records.

There are three components of the Order in this Decision and Order that mandate Mr. Horne and partners make monetary payments as a result of their violations of the Raisin Order. First, the Raisin Order requires a handler, who fails to deliver reserve tonnage, to compensate the RAC, as follows:

§ 989.166 Reserve tonnage generally.

> (c) *Remedy in the event of failure to deliver reserve tonnage raisins.* A handler who fails to deliver to the Committee, upon request, any reserve tonnage raisins in the quantity and quality for which he has become obligated ... shall compensate the Committee for the amount of the loss resulting from his failure to so deliver.

7 C.F.R. § 989.166(c). This provision of the Raisin Order leaves me no discretion on the matter and requires that I order Mr. Horne and partners to compensate the RAC for the reserve tonnage raisins

they failed to deliver to the RAC. The Raisin Order also instructs me as to how to calculate the compensation owed by Mr. Horne and partners to the RAC.

§ 989.166 Reserve tonnage generally.

. . . .

(c) *Remedy in the event of failure to deliver reserve tonnage raisins.* . . . The amount of compensation for any shortage of tonnage shall be determined by multiplying the quantity of reserve raisins not delivered by the latest weighted average price per ton received by producers during the particular crop year for free tonnage raisins of the same varietal type or types.

7 C.F.R. § 989.166(c).

For the 2002-2003 crop year, Mr. Horne and partners packed out 98,550 pounds of raisins (CX 82-CX 87). Applying the shrinkage factor (CX 92 at 6) for weight loss during processing, Mr. Horne and partners received 105,000 pounds of raisins in the 2002-2003 crop year. The reserve obligation for the 2002-2003 crop year was 47 percent (CX 88 at 2). Mr. Horne and partners' reserve obligation for that crop year was 49,350 pounds (.47 x 105,000 = 49,350). The producer price for raisins was $394.85 per ton (CX 161 at 3). Therefore, for the 2002-2003 crop year, Mr. Horne and partners owe $9,742.93 to the RAC for compensation for failing to deliver any reserve raisins to RAC (49,350 pounds divided by 2000 pounds per ton = 24.675 tons; 24.675 tons x $394.85 per ton equals $9,742.93).

Similarly, for the 2003-2004 crop year, Mr. Horne and partners packed out 1,965,650 pounds of raisins (CX 3-CX 56). These raisins included natural seedless raisins and other varieties. Applying the 2003-2004 shrinkage factor for each variety indicates that Mr. Horne and partners received 2,066,066 pounds of raisins in the 2003-2004 crop year. Of the 2,066,066 pounds of raisins received, 2,037,196 pounds were natural seedless raisins subject to the 30 percent reserve obligation (CX 161). Mr. Horne and partners' reserve obligation for the 2003-2004 crop year was 611,159 pounds (.30 x 2,037,196 = 611,158.8). The producer price for raisins was $567 per ton (71 Fed. Reg. 29,565, 29,569 (May 23, 2006)).[10] Therefore, for the 2003-2004 crop year, Mr. Horne and partners owe $173,263.58 to the RAC for compensation for failing to deliver any reserve raisins to the RAC (611,159 pounds divided by 2000 pounds per ton = 305.5795 tons; 305.5795 tons x $567 per ton equals $173,263.58).

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[10] The Agricultural Marketing Service calculated the 2003-2004 reserve obligation compensation using a producer price of $810 per ton. The record citation for this producer price is CX 93, the RAC marketing policy for the 2003-2004 crop year. The RAC marketing policy for the 2003-2004 crop year mentions a "probable price" at $810 per ton (CX 93 at 4). However, the interim final rule setting the Final Free and Reserve Percentages for the 2005-2006 crop year identifies the producer prices for the 2003-2004 crop year as $567 (71 Fed. Reg. 29,565, 29,569 (May 23, 2006)). The Administrator's Brief in Opposition to Respondents' Appeal of the ALJ's Decision and Order was filed well after the date the producer prices were published in the Federal Register. The Administrator had an obligation to notify me that the original calculations were erroneous.

The Raisin Order requires that each handler contribute to the costs associated with operating the RAC, as follows:

> **§ 989.80 Assessments.**
>
> (a) Each handler shall, with respect to free tonnage acquired by him, . . . pay to the committee, upon demand, his pro rata share of the expenses . . . which the Secretary finds will be incurred, as aforesaid, by the committee during each crop year. . . Such handler's pro rata share of such expenses shall be equal to the ratio between the total free tonnage acquired by such handler . . . during the applicable crop year and the total free tonnage acquired by all handlers . during the same crop year.

7 C.F.R. § 989.80(a). The assessment rate was established at $8 per ton (CX 90).

As noted in this Decision and Order, *supra*, for the 2002-2003 crop year, Mr. Horne and partners received 105,000 pounds of raisins. The reserve obligation for the 2002-2003 crop year was 47 percent, therefore, the free tonnage was 53 percent (CX 88 at 2). Mr. Horne and partners' free tonnage for that crop year was 55,650 pounds (.53 x 105,000 = 55,650). Mr. Horne and partners' assessment obligation for the 2002-2003 crop year is $222.60 (55,650 pounds divided by 2000 pounds per ton = 27.825 tons; 27.825 tons x $8 per ton = $222.60).

The calculation of the assessment for the 2003-2004 crop year is complicated by the multiple varieties processed during that year, including

varieties without reserve requirements. Mr. Horne and partners received 2,066,066 pounds of raisins in the 2003-2004 crop year. Of the 2,066,066 pounds of raisins received, 2,037,196 pounds were natural seedless raisins subject to the 30 percent reserve obligation (CX 161). The free tonnage of natural seedless raisins was 1,426,037.2 pounds (.70 x 2,037,196 = 1,426,037.2). In addition, there were 28,870 pounds of other varieties which were all free tonnage (2,066,066 - 2,037,196 = 28,870). Thus, the total free tonnage for the 2003-2004 crop year was 1,454,907.2 pounds. At an assessment rate of $8 per ton, Mr. Horne and partners' assessment obligation for the 2003-2004 crop year is $5,819.63 (1,454,037.2 pounds divided by 2000 pounds per ton = 727.4536 tons; 727.4536 tons x $8 per ton = $5,819.63). The total assessment due to the RAC by Mr. Horne and partners for both crop years is $6,042.23.[11]

I find it necessary to briefly note that, although the Raisin Order requires payment of the assessment "upon demand" and the record contains no evidence of such demand for the 2002-2003 crop year, my decision ordering payment is appropriate. I conclude Mr. Horne and partners' failure to file accurate forms with the RAC noting the volume of raisins processed incapacitated the RAC ability to make the demand

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[11] The Administrator, as the party seeking enforcement of the Raisin Order, should have provided a better road map to calculate both the assessment and compensation for failing to deliver any reserve raisins to the RAC. The Administrator should have provided a specific formula for determining the money owed as well as a record cite where each number utilized in the calculation of the money owed could be located.

for payment of the assessment. The RAC 1999-2000 Analysis Report states:

> The documentation of deliveries, on an individual grower basis, establishes the database on which most other functions are based. This includes: the accountability of all raisin deliveries, responsibility of packers' administrative assessments, packers' reserve pool obligations and the basis upon which the RAC staff distributes reserve pool equity to the grower.

RX 70 at 8. Without the information to determine the amounts of payment, the RAC could not demand the payment. Now that I have calculated the amount of the administrative assessments and reserve pool obligations, those amounts are due and payable.

The AMAA authorizes civil penalties for violations of marketing orders, such as the Raisin Order, issued under the AMAA.

§ 608c. Orders

. . . .

(14) Violation of order

. . . .

(B) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order may be assessed a civil penalty by the Secretary not exceeding $1,000 for

> each such violation. Each day during which such violation continues shall be deemed a separate violation. . . . The Secretary may issue an order assessing a civil penalty under this paragraph only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable in the district courts of the United States in any district in which the handler subject to the order is an inhabitant, or has the handler's principal place of business. The validity of such order may not be reviewed in an action to collect such civil penalty.

7 U.S.C. § 608c(14)(B) (Supp. V 2005).[12]

In determining the amount of the civil penalty for violations of the Raisin Order, certain factors should be considered including:

> nature of the violations, the number of violations, the damage or potential damage to the regulatory program from the type of violations involved here, the amount of profit potentially available to a handler who commits such violations, prior warnings or instructions given to

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[12] Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture, by regulation, adjusted the civil monetary penalty that may be assessed under the AMAA (7 U.S.C. § 608c(14)(B)) for each violation of a marketing order, by increasing the maximum civil penalty from $1,000 to $1,100 (7 C.F.R. § 3.91(b)(vii) (2005)).

> [the violator], and any other circumstances shedding light on the degree of culpability involved.

In re Onofrio Calabrese, 51 Agric. Dec. 131, 154-55 (1992), *aff'd sub nom. Balice v. USDA*, No. CV–F-92-5483–GEB (E.D. Cal. July 14, 1998), *printed in* 57 Agric. Dec. 841 (1998), *aff'd*, 203 F.3d 684 (9th Cir. 2000), *reprinted in* 59 Agric. Dec. 1 (2000).

I have reviewed the recommendation of the Administrator regarding a civil penalty. I have examined the factors to be considered for determining the amount of the civil penalty. I examined the actions of Mr. Horne and partners as these actions relate to the factors, including an examination of their tax returns (RX 13) to determine the impact of the violations on the revenue generated by the partners. I find that intentional violations of the Raisin Order's requirements that a handler shall pay assessments, have inspections performed, hold a percentage of the raisins handled in reserve, and file specified reports are serious violations of both the AMAA and the Raisin Order. Furthermore, I find the violations by Mr. Horne and partners significantly increased the revenue generated by the partnership (RX 13). Therefore, I conclude a significant civil penalty is warranted to deter Mr. Horne and partners, as well as other handlers, from committing similar violations in the future.

As discussed in this Decision and Order, *supra*, I have found that Mr. Horne and partners committed the following violations:

- Twenty violations of section 989.73 of the Raisin Order (7 C.F.R. § 989.73) by filing inaccurate reporting forms to the RAC on 20 occasions.

- Fifty-eight violations of section 989.58(d) of the Raisin Order (7 C.F.R. § 989.58(d)) by failing to obtain incoming inspections of raisins on 58 occasions.

- Two violations of section 989.80 of the Raisin Order (7 C.F.R. § 989.80) by failing to pay assessments to the RAC in crop year 2002-2003 and crop year 2003-2004.

- Five hundred ninety-two violations of sections 989.66 and 989.166 of the Raisin Order (7 C.F.R. §§ 989.66, .166) by failing to hold raisins in reserve and by failing to pay the RAC the dollar equivalent of the raisins not held in reserve.

- One violation of section 989.77 of the Raisin Order (7 C.F.R. § 989.77) by failing to allow the Agricultural Marketing Service to have access to their records.

The appropriate civil penalties for these violations are: (1) $300 per violation for filing inaccurate reporting forms, in violation of 7 C.F.R. § 989.73, for a total of $6,000; (2) $300 per violation for the failure to obtain incoming inspections, in violation of

7 C.F.R. § 989.58(d), for a total of $17,400; (3) $1,000 for the failure to allow access to records, in violation of 7 C.F.R. § 989.77; (4) $300 per violation for the failure to pay the assessments, in violation of 7 C.F.R. § 989.80, for a total of $600; and (5) $300 per violation for the failure to hold raisins in reserve, in violation of 7 C.F.R. §§ 989.66, .166, for a total of $177, 600. The total civil penalties assessed against Mr. Horne and partners for violating the Raisin Order in the 2002-2003 and 2003-2004 crop years is $202,600. I conclude that civil penalties in these amounts are sufficient to deter Mr. Horne and partners from continuing to violate the Raisin Order and will deter others from similar future violations.

For the foregoing reasons, the following Order is issued.

ORDER

1. Marvin D. Horne, Laura R. Horne, Don Durbahn, Lassen Vineyards, a partnership, and Raisin Valley Farms, a partnership, jointly and severally, are assessed a $202,600 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the "Treasurer of the United States" and sent to:

Frank Martin, Jr.
United States Department of
Agriculture
Office of the General Counsel
Marketing Division
Room 2343-South Building
Washington, DC 20250-1417

Payment of the civil penalty shall be sent to Mr. Martin within 100 days after this Order becomes effective.

2. Marvin D. Horne, Laura R. Horne, Don Durbahn, Lassen Vineyards, a partnership, and Raisin Valley Farms, a partnership, jointly and severally, are ordered to pay to the RAC $6,042.23 in assessments for crop years 2002-2003 and 2003-2004, and $183,006.51 for the dollar equivalent of the California raisins they failed to hold in reserve for crop years 2002-2003 and 2003-2004. Payments of the $6,042.23 for owed assessments and of the $183,006.51 for the dollar equivalent of the California raisins that were not held in reserve shall be sent to the RAC within 100 days after this Order becomes effective.

3. This Order shall become effective on the day after service on Marvin D. Horne, Laura R. Horne, Don Durbahn, Lassen Vineyards, a partnership, and Raisin Valley Farms, a partnership.

RIGHT TO JUDICIAL REVIEW

Marvin D. Horne, Laura R. Horne, Don Durbahn, Lassen Vineyards, a partnership, and Raisin Valley Farms, a partnership, have the right to obtain review of the Order in this Decision and Order in any district court of the United States in which they are inhabitants or have their principal place of business.[13]

Done at Washington, DC

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13 7 U.S.C. § 608c(14)(B).

April 11, 2008

William G. Jenson
Judicial Officer

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	AMAA
	)	Docket No.
Marvin D. Horne and Laura R. Horne, d/b/a Raisin Valley Farms, a partnership and d/b/a Raisin Valley Farms Marketing Association, a/k/a Raisin Valley Marketing, an unincorporated association	)	04-0002
and	)	
Marvin D. Horne, Laura R. Horne, Don Durbahn, and The Estate of Rena Durbahn, d/b/a Lassen Vineyards, a partnership,	)	
Respondents	)	

Order Granting Petition To Reconsider

PROCEDURAL HISTORY

On December 8, 2006, Administrative Law Judge Victor W. Palmer [hereinafter the ALJ] issued a Decision and Order in which he found that Marvin D. Horne, Laura R. Horne, Don Durbahn, and Rena Durbahn, now deceased, acting together as partners

doing business as Lassen Vineyards,[1] at all times material to this proceeding, acted as a handler of raisins subject to the inspection, assessment, reporting, verification, and reserve requirements of the federal order regulating the handling of Raisins Produced from Grapes Grown in California (7 C.F.R. pt. 989) [hereinafter the Raisin Order]. The ALJ further found that Mr. Horne and partners violated the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. §§ 601-674) [hereinafter the AMAA], and the Raisin Order by failing to obtain inspections of acquired incoming raisins, failing to hold requisite tonnages of raisins in reserve, failing to file accurate reports, failing to allow access to their records, and failing to pay requisite assessments. Pursuant to 7 U.S.C. § 608c(14)(B), the ALJ assessed Mr. Horne and partners a $731,500 civil penalty and ordered payment of $523,037 for the dollar equivalent of raisins not held in reserve and $9,389.73 for owed assessments.

On January 4, 2007, Mr. Horne and partners filed a timely petition for review of the ALJ's Decision and Order. On April 11, 2008, I issued a Decision and Order in which I found Mr. Horne and partners violated the Raisin Order (7 C.F.R. §§ 989.66, .166) by failing to hold in reserve California Natural Sun-dried Seedless raisins and by failing to pay to the Raisin Administrative Committee [hereinafter the RAC] the dollar equivalent of the California raisins that were not held in reserve for crop year 2002-2003 and for crop year 2003-2004. Furthermore, I found

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[1] In this Order Granting Petition To Reconsider, I refer to these respondents, as well as the partnership Raisin Valley Farms, as "Mr. Horne and partners" unless clarity dictates otherwise.

that Mr. Horne and partners violated section 989.80 of the Raisin Order (7 C.F.R. § 989.80) by failing to pay assessments to the RAC for crop year 2002-2003 and for crop year 2003-2004. In total, I found that Mr. Horne and partners committed 673 violations of the Raisin Order. I ordered Mr. Horne and partners to pay to the RAC $6,042.23 in assessments for crop years 2002-2003 and 2003-2004, and $183,006.51 for the dollar equivalent of the California raisins they failed to hold in reserve for crop years 2002-2003 and 2003-2004. Finally, I assessed a civil penalty of $202,600 against Mr. Horne and partners for their violations of the Raisin Order.

On May 12, 2008, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Administrator], filed Complainant's Petition to Reconsider the Decision and Order of the Judicial Officer [hereinafter the Petition to Reconsider]. In the Petition to Reconsider, the Administrator alleged that the calculation of the assessments owed to the RAC by Mr. Horne and partners, as well as the calculations for the value of the raisins that Mr. Horne and partners failed to hold in reserve are not correct and should be modified. On June 3, 2008, Mr. Horne and partners filed Respondents' Opposition to Plaintiff's [sic] Petition to Reconsider [hereinafter Opposition to Petition to Reconsider]. In their Opposition to Petition to Reconsider, Mr. Horne and partners argue four issues:

1. The Administrator's Petition to Reconsider fails to meet the requirements of section 1.146(a)(3) of the Rules of Practice Governing

Formal Adjudicatory Proceedings Instituted by the Secretary [hereinafter the Rules of Practice] (7 C.F.R. § 1.146(a)(3));

2. The Administrator's suggested calculations cannot be confirmed by resort to the evidence;

3. The proposed reconsideration is inconsistent with the law; and

4. A custom or "toll" packer of raisins does not "acquire" raisins.

The Raisin Order mandates record keeping and reporting requirements that are necessary for the implementation of the Raisin Order (7 C.F.R. §§ 989.73, .77). Without such reports and without access to the documents that support these reports, it is difficult for the Agricultural Marketing Service [hereinafter AMS] and the RAC to properly determine the volume of raisins handled as well as the assessments and other monies due. Mr. Horne and partners failed to provide necessary documents until just before the second portion of the hearing on May 23, 2006.

I have spent considerable time examining the record in this proceeding. It appears that the document universe, entered into the record just prior to the second portion of the hearing, is likely missing some documents, while it contains duplicates of others. Determining exact volumes of raisins that flowed through Mr. Horne and partners' facility is difficult.

On June 19, 2008, I issued an Order Seeking Clarification in which I ordered the Administrator to explain how he reached the total weights used in calculating the amounts owed by Mr. Horne and partners. On July 11, 2008, the Administrator filed Administrator's Response to the Judicial Officer's Order Seeking Clarification. The response provides guidance for me to use in determining the appropriate amounts owed by Mr. Horne and partners to the RAC for the assessments and for the dollar equivalent of California raisins that Mr. Horne and partners failed to hold in reserve. The Administrator's analysis explained how AMS reached the proposed assessment amounts and the amounts owed for raisins that Mr. Horne and partners failed to hold in reserve. The analysis contained a citation to each relevant exhibit noting the weight of the raisins sold on the invoice in the exhibit.

Finally, on August 4, 2008, Mr. Horne and partners filed Respondents' Submission Opposing the Administrator's Response to an Order Seeking Clarification, This filing was Mr. Horne and partners' opportunity to challenge the Administrator's numbers.

Mr. Horne and partners did not challenge any of the weights or calculations presented in the Administrator's Response to the Judicial Officer's Order Seeking Clarification. Therefore, I find Mr. Horne and partners accept the Administrator's numbers as accurate and waive the opportunity to contest the numbers.

DISCUSSION

As I discussed in my April 11, 2008, Decision and Order, there are three components of the Order that mandate Mr. Horne and partners make monetary payments as a result of their violations of the Raisin Order (Decision and. Order at 32-40), First, the Raisin Order requires a handler, who fails to deliver reserve tonnage, to compensate the RAC, as follows:

§ 989.166 Reserve tonnage generally.

> (c) *Remedy in the event of failure to deliver reserve tonnage raisins.* A handler who fails to deliver to the Committee, upon request, any reserve tonnage raisins in the quantity and quality for which he has become obligated . . shall compensate the Committee for the amount of the loss resulting from his failure to so deliver.

7 C.F.R. § 989.166(c).

This provision of the Raisin Order leaves me no discretion on the matter and requires that I order Mr. Horne and partners to compensate the RAC for the reserve tonnage raisins they failed to deliver to the RAC. The Raisin Order also instructs me as to how to calculate the compensation owed by Mr. Horne and partners to the RAC.

§ 989.166 Reserve tonnage generally.

> (c) *Remedy in the event of failure to deliver reserve tonnage raisins.* . The amount of compensation for any shortage

> of tonnage shall be determined by multiplying the quantity of reserve raisins not delivered by the latest weighted average price per ton received by producers during the particular crop year for free tonnage raisins of the same varietal type or types[.]

7 C.F.R. § 989.166(c).

Mr. Horne and partners argued in their Opposition to Petition to Reconsider that the Administrator's calculations cannot be confirmed by resort to the evidence (Opposition to Pet. to Reconsider at 2). Mr. Horne and partners' argument has some validity for the 2002-2003 crop year, in that, without additional clarification, the determination of the weight of the raisins handled by Mr. Horne and partners for the 2002-2003 crop year, is difficult. Because of this difficulty, I ordered the Administrator to clarify his calculations of the weight of the raisins. The Administrator's Response to the Judicial Officer's Order Seeking Clarification provides the necessary clarification. Mr. Horne and partners were given the opportunity to respond to the Administrator's clarifications. Mr. Horne and partners filed Respondents' Submission Opposing the Administrator's Response to an Order Seeking Clarification. However, in this submission, Mr. Horne and partners do not challenge the Administrator's numbers and the exhibits that support the numbers. Therefore, I find Mr. Horne and partners accept the Administrator's process for determining the weight of raisins handled as accurate and Mr. Horne and partners waive any

challenge to the Administrator's conclusions regarding the weight of the raisins.

The Administrator did not challenge my findings regarding the weight of the raisins handled by Mr. Horne and partners in the 2003-2004 crop year. Furthermore, Mr. Horne and partners did not challenge the numbers I used in calculating the reserve tonnage for the 2003-2004 crop year. Therefore, I find that the Administrator and Mr. Horne and partners accept, as accurate, the weights used by me in my April 11, 2008, Decision and Order for the 2003-2004 crop year.

The final component necessary for the calculation of the value of the raisins Mr. Horne and partners failed to hold in reserve is the "latest weighted average price per ton received by producers during the particular crop year for free tonnage raisins of the same varietal type or types." (7 C.F.R. § 989.166(c).) In my April 11, 2008, Decision and Order, I used the "producer price" to calculate the reserve payment requirement. The Administrator argues that the appropriate price is the "announced price" found in the January 10, 2003, letter to the RAC from the Raisin Bargaining Association (CX 583). In *Lion Raisins, Inc. v. United States*, 416 F.3d 1356, 1360 (Fed. Cir. 2005), the United States Court of Appeals for the Federal Circuit held that the "market price for free-tonnage raisins, or the field price, is not set by the RAC, but is determined through a private bargaining process carried out between producers' and handlers' bargaining associations." The Administrator's "announced price" (CX 583 at 2) meets the Federal Circuit's definition of market price; therefore, I use the

"announced price" found in the January 10, 2003, letter as the price for calculating the value of the raisins that Mr. Horne and partners failed to hold in reserve.

In the 2002-2003 crop year, Mr. Horne and partners packed out 1,266,924 pounds of raisins (Exhibit B to the Administrator's Response to the Judicial Officer's Order Seeking Clarification). Applying the shrinkage factor of 0.93857 (CX 92 at 6) for weight loss during processing, Mr. Horne and partners received 1,349,844.9769 pounds of raisins in the 2002-2003 crop year. The reserve obligation for the 2002-2003 crop year was 47 percent (CX 88 at 2-3). Mr. Horne and partners' reserve obligation for that crop year was 634,427.1392 pounds (.47 x 1,349,844.9769 = 634,427.1392). The announced price for raisins was $745 per ton (CX 583 at 2-3). Therefore, for the 2002-2003 crop year, Mr. Horne and partners owe $236,324.13 to the RAC for compensation for failing to deliver any reserve raisins to RAC (634,427.1392 pounds divided by 2,000 pounds per ton = 317.2136 tons; 317.2136 tons x $745 per ton equals $236,324.13).

Similarly, for the 2003-2004 crop year, Mr. Horne and partners packed out 1,965,650 pounds of raisins (CX 3-CX 56). These raisins included natural seedless raisins and other varieties. Applying the 2003-2004 shrinkage factor for each variety indicates that Mr. Horne and partners received 2,066,066 pounds of raisins in the 2003-2004 crop year. Of the 2,066,066 pounds of raisins received, 2,037,196 pounds were natural seedless raisins subject to the 30 percent reserve obligation (CX 161). Mr. Borne and partners' reserve obligation for the 2003-2004

crop year was 611,159 pounds (.30 x 2,037,196 = 611,158.8). The announced price for raisins was $810 per ton (CX 583 at 2-3). Therefore, for the 2003-2004 crop year, Mr. Horne and partners owe $247,519.40 to the RAC for compensation for failing to deliver any reserve raisins to the RAC (611,159 pounds divided by 2,000 pounds per ton = 305.5795 tons; 305.5795 tons x $810 per ton equals $247,519.40). The total amount owed to the RAC by Mr. Horne and partners for failing to deliver any reserve raisins to RAC is $483,843.53.

The Raisin Order also requires that each handler contribute to the costs associated with operating the RAC, as follows:

> **§ 989.80 Assessments.**
>
> (a) Each handler shall, with respect to free tonnage acquired by him, . . . pay to the committee, upon demand, his pro rata share of the expenses . . . which the Secretary finds will be incurred, as aforesaid, by the committee during each crop year. . . Such handler's pro rata share of such expenses shall be equal to the ratio between the total free tonnage acquired by such handler . . during the applicable crop year and the total free tonnage acquired by all handlers during the same crop year.

7 C.F.R. § 989.80(a). The assessment rate was established at $8 per ton (CX 90).

As noted in this Order Granting Petition to Reconsider, *supra*, for the 2002-2003 crop year, Mr. Horne and partners received 1,349,844.9769 pounds

of natural seedless raisins. The reserve obligation for the 2002-2003 crop year was 47 percent; therefore, the free tonnage was 53 percent (CX 88 at 2). Mr. Horne and partners' free tonnage for natural seedless raisins in that crop year was 715,417.8378 pounds (.53 x 1,349,844.9769 = 715,417.8378). In addition, Mr. Horne and partners received 25,523.0198 pounds of other variety raisins. There was no reserve requirement for those raisins; therefore, all of those other variety raisins were subject to the assessment. Mr. Horne and partners' assessment obligation for the 2002-2003 crop year for natural seedless raisins is $2,861.67 (715,417.8378 pounds divided by 2,000 pounds per ton = 357.7089 tons; 357.7089 tons x $8 per ton = $2,861.67). The assessment obligation for the other varieties is $102.09 (25,523.0198 pounds divided by 2,000 pounds per ton 12.7615; 12.7615 tons x $8 per ton = $102.09). The total assessment owed for the 2002-2003 crop year is $2,963.76.

Mr. Horne and partners received 2,066,066 pounds of raisins in the 2003-2004 crop year. Of the 2,066,066 pounds of raisins received, 2,037,196 pounds were natural seedless raisins subject to the 30 percent reserve obligation (CX 161). The free tonnage of natural seedless raisins was 1,426,037.2 pounds (.70 x 2,037,196 = 1,426,037.2). In addition, there were 28,870 pounds of other varieties which were all free tonnage (2,066,066 2,037,196 28,870). Thus, the total free tonnage for the 2003-2004 crop year was 1,454,907.2 pounds. At an assessment rate of $8 per ton, Mr. Horne and partners' assessment obligation for the 2003-2004 crop year is $5,819.63 (1,454,037.2 pounds divided by 2,000 pounds per ton 727.4536 tons; 727.4536 tons x $8 per ton =

$5,819.63). The total assessment due to the RAC by Mr. Horne and partners for the 2002-2003 crop year and the 2003-2004 crop year is $8,783.39.

The third monetary payment resulting from Mr. Horne and partners' violations of the Raisin Order are civil penalties. The AMAA authorizes civil penalties for violations of marketing orders, such as the Raisin Order, issued under the AMAA.

§ 608c. Orders

(14) Violation of order

. . . .

(B) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order may be assessed a civil penalty by the Secretary not exceeding $1,000 for each such violation. Each day during which such violation continues shall be deemed a separate violation[.] . . The Secretary may issue an order assessing a civil penalty under this paragraph only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable in the district courts of the United States in any district in which the handler subject to the order is an inhabitant, or has the handler's principal place of business. The validity of such order may not be reviewed in an action to collect such civil penalty.

7 U.S.C. § 608c(14)(B) (Supp. V 2005).[2]

As neither Mr. Horne and partners nor the Administrator challenged the amount of the civil penalties imposed in my April 11, 2008, Decision and Order, those civil penalties stand. As discussed in my April 11, 2008, Decision and Order, I find Mr. Horne and partners committed the following violations:

- Twenty violations of section 989.73 of the Raisin Order (7 C.F.R. § 989.73) by filing inaccurate reporting forms with the RAC on 20 occasions.

- Fifty-eight violations of section 989.58(d) of the Raisin Order (7 C.F.R. § 989.58(d)) by failing to obtain incoming inspections of raisins on 58 occasions.

- Two violations of section 989.80 of the Raisin Order (7 C.F.R. § 989.80) by failing to pay assessments to the RAC in crop year 2002-2003 and crop year 2003-2004.

- Five hundred ninety-two violations of sections 989.66 and 989.166 of the

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[2] Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture, by regulation, adjusted the civil monetary penalty that may be assessed under the AMAA (7 U.S.C. § 608c(14)(B)) for each violation of a marketing order, by increasing the maximum civil penalty from $1,000 to $1,100 (7 C.F.R. § 3.91(b)(1)(vii) (2005)).

Raisin Order (7 C.F.R. §§ 989.66, .166) by failing to hold raisins in reserve and by failing to pay the RAC the dollar equivalent of the raisins not held in reserve.

- One violation of section 989.77 of the Raisin Order (7 C.F.R. § 989.77) by failing to allow AMS to have access to their records.

The appropriate civil penalties for these violations are: (1) $300 per violation for filing inaccurate reporting forms, in violation of 7 C.F.R. § 989.73, for a total of $6,000; (2) $300 per violation for the failure to obtain incoming inspections, in violation of 7 C.F.R. § 989.58(d), for a total of $17,400; (3) $1,000 for the failure to allow access to records, in violation of 7 C.F.R. § 989.77; (4) $300 per violation for the failure to pay the assessments, in violation of 7 C.F.R. § 989.80, for a total of $600; and (5) $300 per violation for the failure to hold raisins in reserve, in violation of 7 C.F.R. §§ 989.66, .166, for a total of $177, 600. The total civil penalties assessed against Mr. Horne and partners for violating the Raisin Order in the 2002-2003 and 2003-2004 crop years is $202,600. I conclude that civil penalties in these amounts are sufficient to deter Mr. Horne and partners from continuing to violate the Raisin Order and will deter others from similar future violations.

Mr. Horne and partners did not seek reconsideration of my April 11, 2008, Decision and Order; however, they did file an Opposition to Petition to Reconsider. In their opposition, Mr. Horne and partners raised four points:

1. that the Administrator's Petition for Reconsideration fails to meet the requirements of section 1.146(a)(3) of the Rules of Practice (7 C.F.R. § 1.146(a)(3));

2. that the Administrator's suggested calculations cannot be confirmed by resort to the evidence;

3. that the proposed reconsideration is inconsistent with the law; and

4. that a custom or "toll" packer of raisins does not "acquire" the raisins.

Mr. Horne and partners argue that the Petition for Reconsideration failed to meet the requirements of section 1.146(a)(3) of the Rules of Practice (7 C.F.R. § 1.146(a)(3)), in that "there is no section of the Petition devoted to a description of errors made." (Opposition to Pet. to Reconsider at 1.) The Rules of Practice do not require a specific format for petitions to reconsider. The only requirement is that the "petition must state specifically the matters claimed to have been erroneously decided and the alleged errors must be briefly stated." (7 C.F.R. § 1.146(a)(3).) The Administrator's Petition to Reconsider clearly meets that requirement. It was easy to discern, from the Petition to Reconsider, the errors that the Administrator claimed I made in my April 11, 2008, Decision and Order. I find that the Administrator's Petition to Reconsider meets the requirements of the Rules of Practice.

Next, Mr. Horne and partners claim "that the Administrator's suggested calculations cannot be confirmed by resort to the evidence." While 1 agree that the Administrator's filings do not present the image of clarity — which is why I ordered the Administrator to provide clarification —1 found that I was able to follow the transactions identified in Exhibits A and B to the Administrator's Response to the Judicial Officer's Order Seeking Clarification. Therefore, using Exhibits A and B to the Administrator's response, I was able to determine the volume of raisins that flowed through Mr. Horne and partners' facility and the tonnage of raisins that they failed to hold in reserve, as well as the assessments and the payments in lieu of reserve raisins that Mr. Horne and partners owed to the RAC.

Mr. Horne and partners' third point is that "the proposed reconsideration is inconsistent with the law." Mr. Horne and partners are challenging the constitutionality of the Raisin Order. As I discussed in my April 11, 2008, Decision and Order, I have no authority to determine the constitutionality of the various statutes administered by the United States Department of Agriculture. *Califano v. Sanders*, 430 U.S. 99, 109 (1977) ("Constitutional questions obviously are unsuited to resolution in administrative hearing procedures"); *Robinson v. United States*, 718 F.2d 336, 338 (10th Cir. 1983) ("The agency is an inappropriate forum for determining whether its governing statute is constitutional"). Therefore, Mr. Horne and partners' questioning of the constitutionality of the Raisin Order falls on legally deaf ears. I need not point out to Mr. Horne and partners that the Court of Federal

Claims recently found the arguments made in this appeal to be unavailing. *Evans v. United States*, 74 Fed. Cl. 554 (2006). The United States Court of Appeals for the Federal Circuit affirmed the Court of Federal Claims Decision, 250 F. App'x 231 (2007), and the Supreme Court of the United States denied a petition for certiorari, 128 S. Ct. 1292 (2008). Until the appropriate court instructs me otherwise, I will treat the Raisin Order as constitutional, as I believe it to be.

As I discussed in my April 11, 2008, Decision and Order, the reference to Farmer-to-Consumer Direct Marketing Act of 1976 (7 U.S.C. §§ 3001-3006) provides Mr. Horne and partners little solace. They argue that it exempts them from handler obligations under the Raisin Order because they were attempting to promote the policy of that statute. The ALJ found this argument "patently specious" and I agree. The Farmer-to-Consumer Direct Marketing Act does not exempt raisin producers from the requirements of the Raisin Order.

Furthermore, the type of activity that the Farmer-to-Consumer Direct Marketing Act sought to encourage was the farmers market where farmer and consumer could come together directly and avoid middlemen. Mr. Horne and partners presented no evidence that their activities, in fact, supported the goals of the Farmer-to-Consumer Direct Marketing Act. Mr. Horne and partners sold raisins in wholesale packaging and quantities, frequently to candy makers and other food processors as ingredients for other food products. Mr. Horne and partners showed no connection between their business activities and the goals of the Farmer-to-

Consumer Direct Marketing Act. Therefore, even if the Farmer-to-Consumer Direct Marketing Act exempted raisin producers from the mandates of the Raisin Order — which it does not — Mr. Horne and partners failed to demonstrate compliance with the goals of the Farmer-to-Consumer Direct Marketing Act.

The final issue raised by Mr. Horne and partners is whether a custom or "toll" packer of raisins "acquires" the raisins, This issue was discussed in my April 11, 2008, Decision and Order. A handler becomes a "first handler" when he "acquires" raisins, a term specifically and plainly defined by the Raisin Order:

§ 989.17 Acquire.

> *Acquire* means to have or obtain physical possession of raisins by a handler at his packing or processing plant or at any other established receiving station operated by him: . . . Provided further, That the term shall apply only to the handler who first acquires the raisins.

7 C.F.R. § 989.17.

The record demonstrates that Mr. Horne and partners, in their operation of the packing house known as Lassen Vineyards, were first handlers who acquired raisins during crop years 2002-2003 and 2003-2004. Mr. Horne and partners' arguments that they did not acquire raisins are unavailing in light of the plain meaning of the language of the Raisin Order defining the term "acquire." Moreover, if there were any ambiguity, the interpretation given by the United States Department of Agriculture, both at the

time of the issuance of the Raisin Order and in subsequent correspondence with the Hornes, is clear, straightforward, of long-standing, and controlling. *See Barnhart v. Walton*, 535 U.S. 212 (2002); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The 1949 recommended decision regarding the raisin growers' request for the Raisin Order, which was adopted as part of the Secretary of Agriculture's final decision, explained the language employed and clarified that:

> The term "acquire" should mean to obtain possession of raisins by the first handler thereof. The significance of the term "acquire" should be considered in light of the definition of "handler" (and related definitions of "packer" and "processor"), in that the regulatory features of the order would apply to any handler who acquires raisins. Regulation should take place at the point in the marketing channel where a handler first obtains possession of raisins, so that the regulatory provisions of the order concerning the handling of raisins would apply only once to the same raisins. Numerous ways by which handlers might acquire raisins were proposed for inclusion in the definition of the term, the objective being to make sure that all raisins coming within the scope of handlers' functions were covered and, conversely, to prevent a way being available whereby a portion of the raisins handled in the area would not be covered.

> Some of the ways by which a handler might obtain possession of raisins include: (i) Receiving them from producers, dehydrators, or others, whether by purchase, contract, or by arrangement for toll packing, or packing for a cash consideration[.]

14 Fed. Reg. 3083, 3086 (June 8, 1949).

This interpretation is consistent with testimony at the hearing conducted to consider the need of the raisin industry for a marketing order and its appropriate terms:

> Q Mr. Hoak, suppose a packer stems, cleans, and performs other operations connected with the processing of raisins for a producer and then the producer sells the raisins to another packer. Under this proposal, which person should be required to set the raisins aside?
>
> A The man who performs the packing operation, who is the packer.
>
> Q Mr. Hoak, I believe that you have testified earlier that the term "packer" should include a toll packer. By that do you mean that it should include a person who takes raisins for someone else for a fee?
>
> A That is right.
>
> Q Also, did I understand you to say that that person should be the one who would be required to set aside or establish the pools under the regulatory provisions?

> A That is right. He is the man who would be held responsible for setting aside the required amount of raisins.
>
> Q I take it that that man would not have title to any raisins insofar as he is a toll packer; is that correct?
>
> A That is right.

AU Decision and Order, App. A.

These excerpts from the recommended decision and the hearing transcript were sent to an attorney representing Mr. and Mrs. Horne on April 23, 2001. Apparently, they believe their personal interpretation of the term "acquire" as used in the Raisin Order should take precedence over the plain language of the Raisin Order and the interpretation of its meaning that was conveyed to them by the United States Department of Agriculture. The decision of Mr. Horne and partners not to follow the United States Department of Agriculture's interpretative advice, and, instead, to play a kind of shell game with interlocking partnerships and a marketing association to try to conceal their role as first handler, only shows that they acted willfully and intentionally when they decided not to file accurate reports, not to hold raisins in reserve, not to have incoming raisins inspected, not to pay assessments, and not to allow inspection of their records for verification purposes.

In simple terms, Mr. Horne and partners, as a matter of law, acquired raisins, as first handlers, when raisins arrived at the processing/packing facility known as Lassen Vineyards. Their arguments that title to the raisins never transferred

from the grower to Mr. Horne and partners under California law is unavailing. California law does not control, the Raisin Order does. Under the Raisin Order, the term "acquire" is a term of art that does not encompass an ownership interest but rather physical possession. Mr. Horne and partners obtained physical possession of— thus they "acquired" — raisins when a grower brought raisins to the facility.

For the foregoing reasons, I grant the Administrator's Petition to Reconsider and issue the following Order.

ORDER

1. Marvin D. Horne, Laura R. Horne, Don Durbahn, Lassen Vineyards, a partnership, and Raisin Valley Farms, a partnership, jointly and severally, are assessed a $202,600 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the "Treasurer of the United States" and sent to:

> Frank Martin, Jr.
> United States Department of Agriculture
> Office of the General Counsel
> Marketing Division
> Room 2343-South Building
> Washington, DC 20250-1417

Payment of the civil penalty shall be sent to Mr. Martin within 100 days after this Order becomes effective.

2. Marvin D. Horne, Laura R. Horne, Don Durbahn, Lassen Vineyards, a partnership, and Raisin Valley Farms, a partnership, jointly and severally, are ordered to pay to the RAC $8,783.39 in

assessments for crop years 2002-2003 and 2003-2004, and $483,843.53 for the dollar equivalent of the California raisins they failed to hold in reserve for crop years 2002-2003 and 2003-2004. Payments of the $8,783.39 for owed assessments and of the $483,843.53 for the dollar equivalent of the California raisins that were not held in reserve shall be sent to the RAC within 100 days after this Order becomes effective.

3. This Order shall become effective on the day after service on Marvin D. Horne, Laura R. Horne, Don Durbahn, Lassen Vineyards, a partnership, and Raisin Valley Farms, a partnership.

RIGHT TO JUDICIAL REVIEW

Marvin D. Horne, Laura R. Horne, Don Durbahn, Lassen Vineyards, a partnership, and Raisin Valley Farms, a partnership, have the right to obtain review of the Order in this Order Granting Petition To Reconsider in any district court of the United States in which they are inhabitants or have their principal place of business.[3]

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[3] 7 U.S.C. § 608414)(B).

Done at Washington, DC

September 18, 2008

William G. Jenson
Judicial Officer

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MARVIN D. HORNE and LAURA R. HORNE, d.b.a. RAISIN VALLEY FARMS and RAISIN VALLEY FARMS MARKETING ASSOCIATION; MARNIV D. HORNE; LAURA D. HORNE; DON DURBAHN; and the ESTATE of RENA DURBAHN, d.b.a. LASSEN VINEYARDS,
Plaintiffs,
v.
UNITED STATE DEPARTMENT OF AGRICULTURE, Defendant.

No. CV–F–08–1549 LJO SMS. | Dec. 11, 2009.

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT (Docs. 24, 26)

I. INTRODUCTION

Plaintiffs appeal an administrative decision of a defendant United States Department of Agriculture ("USDA") Judicial Officer ("JO") that imposed civil penalties and assessments for Plaintiffs' alleged violation of various provisions of the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. § 601 et seq. ("AMAA") and the order regulating the Handling of Raisins Produced from Raisin Variety Grapes Grown in California, 7 C.F.R. Part 989 ("Marketing Order"). This appeal presents four issues on cross motions for summary judgment: First, this Court considers Plaintiffs' challenge to the JO's opinion that Plaintiffs are "handlers" who "acquired" raisins and were therefore subject to the

Marketing Order. Second, the Court considers whether the penalties imposed by the JO violate the Excessive Fines Clause of the Eighth Amendment to the United States Constitution. Third, the Court is asked to decide whether the Marketing Order's reserve requirement violates the Due Process Clause of the Fifth Amendment to the United States Constitution as a physical taking of Plaintiffs' property without just compensation. Finally, this Court determines whether the JO's decision to dismiss Plaintiffs' administrative petition was arbitrary, capricious, an abuse of discretion, and contrary to the law. Having read and reviewed the parties' arguments, and considering the administrative record and the applicable case law, this Court GRANTS summary judgment in favor of defendant USDA and against Plaintiffs.

II. BACKGROUND

A. Legal Framework

"The AMAA was originally enacted during the Depression, with the objective of helping farmers obtain a fair value for their agricultural products." *Lion Raisins, Inc. v. U.S.*, 416 F.3d 1356, 1358 (Fed. Cir. 2005) (*"Lion II"*), *citing Pescosolido v. Block*, 765 F.2d 827, 828 (9th Cir. 1985); 7 U.S.C. § 602 (2000). The AMAA "contemplates a cooperative venture among the Secretary [of Agriculture], handlers, and producers the principal purposes of which are to raise the price of agricultural products and to establish an orderly system for marketing them." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 346 (1984). To accomplish this, the AMAA delegates authority to the Secretary of Agriculture to issue

marketing orders regulating the sale and delivery of various commodities, including raisins. The Marketing Order was created in an effort to limit the supply of raisins on the open market, and thus, to stabilize prices. *See* 7 U.S.C. §§ 608c (1), (2), (6)(C).

The Marketing Order does not regulate raisin producers (i.e., growers, farmers). Instead, "handlers" of California raisins are subject to the requirements of the Marketing Order, 7 C.F.R. § 981.1 et seq. Handlers who acquire raisins are required, inter alia, to: (1) obtain USDA inspections of raisins acquired or received from growers, 7 C.F.R. § 989.58(d); (2) file accurate reports with the USDA's Raisin Administrative Committee ("RAC"), 7 C.F.R. § 989.73; and (3) allow access to records to verify the accuracy of the reports filed with the RAC. 7 C.F.R. § 989.77. The USDA may obtain injunctive relief, civil penalties, and criminal penalties against handlers who fail to comply with the regulatory provisions of the Marketing Order. 7 U.S.C. §§ 608a(5), 608a(6), 608c(14).

The Marketing Order creates the RAC, a raisin industry group responsible for the administration of the Marketing Order. The RAC is composed of forty-seven members who represent different groups in the raisin industry, including thirty-five producers, ten handlers, one cooperative bargaining association, and one member of the public. The RAC is an agent of the federal government. Members of the RAC are nominated by the industry groups and appointed by the Secretary of Agriculture. 7 C.F.R. §§ 989.26, .29, .30. The RAC receives no federal appropriations. To fund the RAC, handlers must pay an $8 per ton assessment for free tonnage raisins. 7 C.F.R.

§ 989.90. The assessments pay for approximately 50% of the administration costs of the RAC. 7 C.F.R. §§ 989.53, 989.79, 989.80(a), 989.82.

The Marketing Order is designed "to prevent over-production of agricultural products and excessive competition in marketing them, with price stabilization as the ultimate objective." *Parker v. Brown*, 317 U.S. 341, 368 (1943). To accomplish this goal, and as an additional way to fund the RAC, the Marketing Order contains a reserve requirement. The Marketing Order reserve requirement requires handlers to separate the raisins they receive or acquire from producers into "reserve tonnage" raisins for the benefit of the RAC and "free tonnage" raisins. Handlers may sell the free tonnage raisins on the open markets. The reserve tonnage is determined each year as a portion of the raisins that handlers buy from producers. Handlers are required to transfer the reserve tonnage to the RAC. 7 C.F.R. § 989.66, 989.166. While raisin producers hold an equity interest in the reserve tonnage, the RAC may sell or dispose of the reserve raisins in secondary, non-competitive markets. The RAC uses some of the proceeds to fund its administration. The RAC pays to the producers any net proceeds remaining after it has disposed of the crop year's reserve raisins. It generally takes a few years for the RAC to dispose of a crop year's reserve tonnage raisins.

B. Plaintiffs' alleged activities

Marvin D. Horne ("Mr. Horne") has been a raisin farmer since 1969. Administrative Record ("AR") 1646. Mr. Horne and his wife, Laura R. Horne ("Ms. Horne") (collectively "the Hornes") produce raisins under the name of Raisin Valley Farms. *Id.* AR 1646,

1732. Raisin Valley Farms is a California general partnership, with the Hornes as partners. The Raisin Valley Farms name was registered in 1999.

Mr. Horne determined to sell his Raisin Valley Farms raisins without the use of a packer or handler, because he felt that the packers and the RAC "were stealing [his] crop." AR 1676. Mr. Horne consulted with many people, including attorneys, university professors, and officials, in an attempt to create a way to market his raisins without the use of the raisin packer system. Mr. Horne also exchanged several letters with the USDA in an effort to determine how he could market his raisins without becoming subject to the Marketing Order, as discussed in the relevant sections below. The focus of this action relates to the Hornes' activities during the 2002–2003 and 2003–2004 crop years,[4] when the Hornes implemented their plan to market raisins outside of the bounds of the Marketing Order.

Mr. Horne, a former alternate member of the RAC, became a vocal opponent of the Marketing Order. AR 954. Mr. Horne wrote multiple letters to the Secretary of Agriculture and to the RAC to complain about the Marketing Order. AR 6343–44; AR 2423. On April 23, 2002, the Hornes sent a letter to the Secretary of Agriculture and to the RAC asserting that they were registering as a handler "under protest" because:

> we are growers that will pack and market our raisins. We reserve our rights under

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[4] The crop year for raisins begins on August 1 and ends on July 31 of the following year.

> the Constitution of the United States ... [T]he Marketing Order Regulating Raisins has become a tool for grower bankruptcy, poverty, and involuntary servitude. The Marketing Order Regulating Raisins is a complete failure for growers, handlers, and the USDA ... [W]e will not relinquish ownership of our crop. We put forth the money and effort to grow it, not the Raisin Administrative Committee. This is America, not a communist state.

AR 2423. Thereafter, the USDA issued Plaintiffs handler number 94–101 in 2002.

In addition to growing raisins through Raisin Valley Farms, the Hornes entered into a partnership with Ms. Horne's parents, Don Durbahn ("Mr. Durbahn") and Rena Durbahn (collectively, "the Durbahns"), to create Lassen Vineyards. AR 1647–1850, 5550. Lassen Vineyards is a California general partnership between the Hornes and the Durbahns. Lassen Vineyards grows grapes and produces raisins. In addition to its grape growing activities, Lassen Vineyards purchased equipment to clean, stem, sort, and package raisins in 2001.

The Lassen Vineyards raisin packing equipment and facilities were located on land owned by Lassen Vineyards. Mr. Durbahn oversaw the Lassen Vineyard raisin packing plant. Mr. Horne's son, Marvin Horne, Jr. ("Marvin") was the plant manager. The equipment at the plant operated by Lassen Vineyards cleaned, stemmed, sorted, and packaged raisins throughout the 2002–2003 and 2003–2004 crop years. During this time, Lassen

Vineyards packed Raisin Valley Farms and Lassen Vineyards raisins, and packed other farmer's raisins for a fee.

Raisins that were packed at Lassen Vineyards' plant were marketed and sold to wholesale customers by Raisin Valley Farms Marketing Association, an unincorporated association organized and operated by the Hornes ("Raisin Valley Marketing"), during crop years 2002–2003 and 2003–2004. AR 1652, 1996–97, 2117. Over 60 raisin growers joined Raisin Valley Marketing to gain volume selling power. Grower members of Raisin Valley Marketing sent their raisins to Lassen Vineyards' plant to be cleaned, stemmed, sorted, and packaged. According to Plaintiffs, Raisin Valley Marketing sold raisins on behalf of its members, while the growers maintained ownership. According to Mr. Horne, Raisin Valley Marketing held grower sales funds in a trust account, paid Lassen Vineyards for the use of their equipment, paid a third party broker fee, and distributed the net proceeds to the growers.

Lassen Vineyards charged a fee to Raisin Valley Marketing members, typically twelve cents per pound, to pack California raisins at the plant. Lassen Vineyards charged these growers an additional five dollars per pallet for raisins that were boxed and stacked. AR 1940–41, 1957. The packing fee covered the cost of the labor and packaging materials. AR 1942–44. The workers who operated the equipment were "leased" to Lassen Vineyards by Ms. Horne and Ms. Durbahn. AR 1710. The Lassen Vineyards packing operation was supervised on a daily basis by

Mr. Durbahn and Marvin, whose wages were paid by Lassen Vineyards. AR 1948–49.

Plaintiffs contend that during the 2002–2003 and 2003–2004 crop years: Lassen Vineyards was a "leasing company" that "rented" the equipment to other growers to clean, stem, and sort their own raisins and "leased" employees of the plant who operated the machinery; Mr. Durbahn did not process raisins as a handler, he oversaw the operation of a leased plant; Marvin managed the leased equipment; growers leasing the equipment from the Lassen Vineyards plant were assigned lot numbers to preserve the identity of their product; Lassen Vineyards never stored, purchased, controlled, acquired, or handled raisins; growers using the facilities engaged in the cleaning, stemming, sorting, grading, and packing function through leased employees and equipment; and lessees maintained right, title, ownership, and control of the raisins until they were sold to the consumer market. Plaintiffs maintain that they were exempt from the Marketing Order during the 2002–2003 and 2003–2004 crop years, because they were raisin growers, never acquired raisins, and were working within the Farmers to Consumers Direct Marketing Act.

In his testimony, Mr. Horne admitted that both Lassen Vineyards and Raisin Valley Farms acted as "packers" under the Marketing Order during the 2002–2003 and 2003–2004 crop years. AR 1761–62. Mr. Horne admitted that Raisin Valley Farms did not pay assessments, did not have incoming inspections performed, did not hold raisins in reserve, and did not report acquisitions of raisins

during the 2002–2003 and 2003–2004 crop years. AR 1743–45. When asked whether he held raisins in reserve, Mr. Horne replied, "No. They're my raisins." AR 1743. He admitted that his reports to the RAC disclosed "zero acquisitions." AR 1744.

Mr. Horne admitted that for crop years 2002–2003 and 2003–2004, Lassen Vineyards operated a packing house on land with equipment owned jointly by the Hornes and the Durbahns. AR 1685. Mr. Horne further admitted that Lassen Vineyards did not pay assessments, did not have incoming inspections performed, did not hold raisins in reserve, and did not report acquisitions of raisins during the 2002–2003 and 2003–2004 crop years, because "they're not acquired raisins." AR 1747–51.

The USDA performed outgoing inspections on the raisins packed at Lassen Vineyards. AR 1745, 1747–48. During the hearing, the USDA introduced evidence that Lassen Vineyards packed out more than 1.2 million pounds of raisins during the 2002–2003 crop year and more than 1.9 million pounds of raisins for the 2003–2004 crop year. AR 740–51, 2186–2304, AR 2602–5512.

C. Administrator's Proceedings against Plaintiffs

On April 1, 2004, AJ Yates, Administrator of the Agriculture of the Agriculture Marketing Service ("administrator") filed a complaint before the Secretary of Agriculture against the Hornes, d.b.a. Raisin Valley Farms (collectively referred to as "Raisin Valley Farms"). AR 1–5. The administrator's complaint alleged that Raisin Valley Farms was "engaged in the business as 'handler' of California raisins" during the 2002–2003 and 2003–2004 crop

years. AR 1. The administrator alleged that Raisin Valley Farms violated the AMAA and the Marketing Order by submitting inaccurate forms to the RAC, failing to hold inspections of incoming raisins, failing to hold raisins in reserve, failing to pay assessments, and failing to allow access to records. The administrator filed an amended complaint on October 25, 2004.

Raisin Valley Farms denied the allegations. In addition, Raisin Valley Farms filed an amended answer on January 21, 2005 asserting various affirmative defenses, including that the AMAA and the Marketing Order are unconstitutional; Raisin Valley Farms is not a handler and did not acquire physical possession of raisins within the meaning of the regulations; Raisin Valley Farms did not handle or acquire raisins of third-party producers that processed their raisins through equipment owned by Lassen Vineyards; and Raisin Valley Farms was not required to comply with the reporting, incoming inspection, and other requirements alleged in the amended complaint. AR 82–88.

A hearing on the administrator's action took place in front of the administrative law judge ("ALJ") between February 9–11, 2005. At the February 2005 hearing, Mr. Horne testified. After the hearing, and to conform the complaint to the evidence presented at the February 2005 hearing, the administrator moved to amend the complaint to include Raisin Valley Marketing and the Hornes and the Durbahns, doing business as Lassen Vineyards (collectively referred to as "Lassen Vineyards") as parties to the

administrative proceedings.[5] The ALJ granted the administrator's opposed motion to amend, and the second amended complaint was filed on August 10, 2005. Thereafter, a second hearing took place on May 23, 2006.

On November 1, 2006, the ALJ issued a decision and order finding that the Hornes and the Durbahns, "acting together as partners doing business as Lassen Vineyards" acted as first handlers of raisins and were subject to the Marketing Order. The ALJ found that Lassen Vineyards violated the AMAA and the Marketing Order, and ordered Lassen Vineyards (the Hornes and Mr. Durbahn), to pay the following, jointly and severally: (1) $731,500 in civil penalties; (2) $9,389.73 in assessments; and (3) $523,037 as the dollar equivalent of the raisins that Lassen Vineyards failed to hold in reserve.

Plaintiffs appealed the ALJ's decision to the JO on January 4, 2007. In its April 11, 2007 Decision and Order ("Initial Decision"), the JO found that Raisin Valley Farms *and* Lassen Vineyards committed the following violations of the Marketing Order:

> 1. Twenty violations of 7 C.F.R. 989.73 for filing inaccurate reporting forms to the RAC;
>
> 2. Fifty-eight violations of 7 C.F.R.

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[5] Ms. Durbahn died after the initial administrative action was filed but before Lassen Vineyards was added as a party to the administrative complaint. It is unclear from the record whether the Estate of Rena Durbahn was added as a party to the administrative proceedings, although the Estate of Rena Durbahn is a plaintiff in this action.

§ 989.58(d) for failure to obtain incoming inspections;

3. Two violations of 7 C.F.R. § 989.66 for failure to hold reserve raisins for crop year 2002–2003 and 2003–2004;

4. Two violations of 7 C.F.R. § 989.80 for failure to pay assessments to the RAC; and

5. One violation of 7 C.F.R. § 989.77 for failure to allow the Agricultural Marketing Service to have access to the records.

AR 665–706. The administrator sought reconsideration of the JO's Initial Decision, challenging the JO's calculations of the civil penalties and assessments. In its Order Granting Petition to Reconsider, issued September 18, 2008 ("Reconsideration Order"), the JO imposed the following penalties against Lassen Vineyards and Raisin Valley Farms, jointly and severally:

1. $202,600.00 as a civil penalty;

2. $8,783.39 in assessments for the 2002–2003 and 2003–2004 crop years; and

3. $483,843.53 for the alleged dollar equivalent of the California raisins Plaintiffs failed to hold in reserve for the 2002–2003 and 2003–2004 crop years.

AR 757–778.

D. Plaintiffs' Administrative Petition Against

USDA

Plaintiffs filed an administrative petition on March 5, 2007 to challenge various Marketing Order regulations. Plaintiffs filed their administrative petition pursuant to 7 U.S.C. § 608c(15)(A), a procedure created by the AMAA that expressly provides *handlers* an administrative procedure to challenge the Marketing Order. *See United Dairyman of Ariz. v. Veneman*, 279 F.3d 1160, 1164 (9th Cir. 2002). In moving to dismiss Plaintiffs' petition, the USDA argued, among other things, that since Plaintiffs did not admit that they were handlers during the time period in question, they had no jurisdiction to file an administrative petition as handlers. The ALJ denied the USDA's motion to dismiss, reasoning that because the USDA investigated Plaintiffs, determined Plaintiffs were handlers, and initiated proceedings against Plaintiffs to establish they were handlers, Plaintiffs had jurisdiction to file an administrative petition pursuant to 7 U.S.C. § 608c(15)(A). The administrator appealed the ALJ's denial of its motion to dismiss. On February 4, 2008, the JO agreed with the administrator to rule that Plaintiffs lacked jurisdiction to file an administrative petition pursuant to 7 U.S.C. § 608c(15)(A).

On March 18, 2008, forty-three days after the JO's decision, Plaintiffs initiated an action in this Court to appeal the JO's decision. *Horne v. USDA*, CV–08–402 OWW SMS. The USDA moved to dismiss for lack of subject matter jurisdiction. On November 13, 2008, Judge Oliver W. Wanger granted the USDA's motion to dismiss, finding that Plaintiffs' appeal was untimely pursuant 7 U.S.C. § 608c(15)(B). Plaintiffs

appealed Judge Wanger's decision to the Ninth Circuit Court of Appeals. That appeal remains pending.

E. Procedural History

On October 14, 2008, Plaintiffs[6] filed their complaint in this Court seeking declaration relief and review of the USDA's decision pursuant to 7 U.S.C. § 608c(14)(B). Plaintiffs moved for summary judgment on August 28, 2009. The USDA moved for summary judgment on October 6, 2009. Plaintiffs opposed the USDA's motion on November 3, 2009. The USDA opposed Plaintiffs' motion on November 19, 2009. As no party requested oral argument, this Court vacated the December 4, 2009 hearing by minute order on November 30, 2009.

III. STANDARD OF REVIEW

Plaintiffs challenge the JO's Initial Decision and Reconsideration Order pursuant to the Administrative Procedures Act ("APA"), 5 U.S.C.

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[6] Plaintiffs are the Hornes, d.b.a. Raisin Valley Farms; the Hornes' unincorporated association Raisin Valley Marketing; and the Hornes, Mr. Durbahn, and the Estate of Rena Durbahn, d.b.a. Lassen Vineyards. Although the JO's orders affect the Hornes, Mr. Durbahn, Lassen Vineyards, and Raisin Valley Farms, all plaintiffs collectively assert their arguments against the JO's orders. Accordingly, when referring to Plaintiffs' arguments, this Court's use of the term "Plaintiffs" refers to all of the named plaintiffs. When referring to "Plaintiffs" with regard to the JO's orders, the term "Plaintiffs" refers only to those plaintiffs affected by the JO's orders. To avoid confusion, this Court will use specific plaintiff names where practicable.

§ 706(2)(A). When reviewing an order under the APA, "[j]udicial review of an agency decision is narrow." *Balice v. USDA*, 203 F.3d 684, 689 (9th Cir. 2000). This Court may not weigh the evidence and substitute its own findings for those of the agency. *Id.* According to the statute, this Court may set aside an agency decision only when it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An agency does not act in an arbitrary and capricious manner when it presents a "rational connection between the facts found and the conclusions made." *Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 384 F.3d 1163, 1170 (9th Cir. 2004).

In an action for judicial review of an administrative decision, the burdens of persuasion and proof rest with the party challenging the ALJ's or JO's decision. *Clyde K. v. Puyallup Sch. Dist., No. 3*, 35 F.3d 1396, 1399 (9th Cir. 1994), *superceded on other grounds by statute, as recognized in M.L. v. Federal Way Sch. Distr.*, 341 F.3d 1052 n. 7 (9th Cir. 2003); *see also, Sorenson Communications, Inc. v. F.C.C.*, 567 F.3d 1215 (10th Cir. 2009) (in APA challenge of agency decision, burden is on petitioner to establish the action is arbitrary and capricious); *Transportation Workers Union of America, AFL–CIO v. Transportation Sec. Admin.*, 492 F.3d 471 (D.C. Cir. 2007) (on petition for review of order of administrative agency, petitioner bears the burden of production on appeal and must support each element of its claim to challenge order by affidavit or other evidence); *Save Our Heritage, Inc. v. F.A.A.*, 269 F.3d 49 (1st Cir. 2001) (those who assail an agency's findings or reasoning have the burden to identify the defects in evidence and the faults in reasoning.).

The APA authorizes this Court to set aside factual findings only if they are "unsupported by substantial evidence." 5 U.S.C. § 706(2)(E); *Armstrong v. Comm'r of Soc. Sec. Admin.*, 160 F.3d 587, 589 (9th Cir. 1998); *Balice*, 203 F.3d at 689. Substantial evidence "does not mean a large or considerable amount of evidence, but rather 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). "Substantial evidence is more than a scintilla but less than a preponderance." *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999). If the record supports more than one rational interpretation of the evidence, the Court will defer to the administrative officer's decision. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n. 1 (9th Cir. 2005). Thus, in its review of a JO decision, the Court will not substitute its judgment for that of the agency. *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989).

IV. DISCUSSION

A. Whether Plaintiffs are "handlers" who "acquired" raisins and are therefore subject to the Raisin Order

The JO found that Lassen Vineyards and Raisin Valley Farms were handlers who acquired raisins and, therefore, were subject to the Marketing Order during the 2002–2003 and 2003–2004 crop years. The JO further found that Lassen Vineyards and Raisin Valley Farms violated numerous provisions of the AMAA and Marketing Order. The parties do not dispute that a handler that acquires raisins is required to obtain incoming inspections, hold the

designated amount in reserve, file reports with the RAC, allow access to records to verify the accuracy of the reports, and pay assessments to the RAC. 7 C.F.R. §§ 989.58(d); 989.66; 989.166; 989.73; 989.77; and 989.90.

In this challenge to the JO's decision, Plaintiffs advance multiple theories that they were either not subject to the Marketing Order or qualified for an exemption. First, Plaintiffs claim that they were not subject to the Marketing Order because they were not handlers. Second, Plaintiffs contend that they were not subject to the Marketing Order because they did not acquire raisins. Third, Plaintiffs assert that prior USDA opinion letters to Plaintiffs support Plaintiffs' position that they would not be subject to the Marketing Order for their activities. Fourth, Plaintiffs argue that there is no evidence that any plaintiff was a handler. Fifth, Plaintiffs assert that the Marketing Order does not apply to lessors of packing equipment. Sixth, Plaintiffs argue that as raisin growers they were exempt from the Marketing Order. Seventh, Plaintiffs argue that the Farmer to Consumer Direct Marketing Act creates an applicable exemption to the Marketing Order. The Court considers, and ultimately rejects, each of Plaintiffs' arguments below.

1. Plaintiffs were "handlers"

Plaintiffs contend that the JO erred to conclude that they were handlers, because the substantial evidence demonstrates that they are raisin growers, not raisin handlers. A "handler" is:

> (a) any processor or packer; (b) any person who places, ships, or continues natural

> conditioned raisins in the current of commerce from within the area to any point outside thereof; (c) any person who delivers off-grade raisins, other failing raisins or raisin residual material to other than a packer or other than into any eligible non-normal outlet; or (d) any person who blends raisins [subject to certain exceptions].

7 C.F.R. § 989.15. According to this definition, an entity is a handler if it is a packer. A "packer" is:

> any person who, within [California], stems, sorts, cleans, or seeds raisins, grades stemmed raisins, or packages raisins for market as raisins: *Provided, That:* (a) No producer with respect to the raisins produced by him, and no group of producers with respect to raisins produced by the producers comprising the group, and not otherwise a packer, shall be deemed a packer if he or it sorts or cleans (with or without water) such raisins in their unstemmed form;

7 C.F.R. § 989.14 (emphasis in original). Thus, if Plaintiffs engaged in stemming, sorting, cleaning, seeding, grading, or packaging of raisins within California, they were "handlers" pursuant to the Marketing Order. Plaintiffs may also be handlers if they "place natural conditioned raisins in the current of commerce." 7 C.F.R. 989. § 15.

The evidence establishes that Lassen Vineyards stemmed, sorted, cleaned and packaged raisins.

Thus, pursuant to 7 C.F.R. § 989.14, Lassen Vineyards was a handler of raisins. Substantial evidence further establishes that Raisin Valley Farms contributed to the packing of raisins at the Lassen Vineyards plant, as discussed more fully below. Moreover, substantial evidence shows that Raisin Valley Farms placed raisins in the stream of interstate commerce. Accordingly, Raisin Valley Farms was a handler.

Plaintiffs argue, however, that as raisin producers, both Lassen Vineyards and Raisin Valley Farms are exempt from the definition of packer. Plaintiffs correctly point out that according to the definition, "[n]o producer with respect to the raisins produced by him ... shall be deemed a packer if he or it sorts or cleans ... such raisins in their unstemmed form." 7 C.F.R. § 989.14. Plaintiffs fail to demonstrate, however, that Lassen Vineyards or Raisin Valley Farms sorted or cleaned their raisins in an *unstemmed* form. The substantial evidence introduced by the USDA at the administrative hearing supports the JO's conclusion that Lassen Vineyards stemmed the raisins in addition to the other packing activities. In addition, Plaintiffs concede that the definition of handler within the Marketing Order "captured within its scope any producer who seeds, grades, packages, or stems raisins or places raisins into interstate commerce." Pl. Mem., 15 (referencing 7 C.F.R. §§ 989.14, 989.15). Accordingly, this exemption is inapplicable to Plaintiffs. Because the substantial evidence demonstrates that Plaintiffs engaged in stemming, sorting, cleaning, seeding, grading, or packaging of raisins within California, they were "handlers" pursuant, and subject, to the Marketing Order.

2. Plaintiffs "acquired" raisins

Plaintiffs contend that there is no evidence that they "acquired" raisins. Plaintiffs argue that the USDA "failed to produce any evidence of a single seller, or buyer, or evidence of consideration or of title transfer. It failed to prove a sale of goods as is required for a simple, ordinary case governed by the Uniform Commercial Code, and it offered no proof of any acquisition." Plaintiffs construe the term "acquire" to require a purchase and sale of goods as demonstrated by the transfer of title.

This Court agrees with the JO that Plaintiffs "arguments that they did not acquire raisins are unavailing in light of the plain meaning of the language of the Raisin Order defining the term." AR 773. The Marketing Order defines "acquire" in the following way:

> "Acquire" means to have or obtain physical possession of raisins by a handler at his packing or processing plant or at any other established receiving station, operated by him: provided that a handler shall not be deemed to acquire raisins (including raisins produced or dehydrated by him) while: (a) he stores them for another person or as a handler-produced tonnage in compliance with the provisions of 989.58 & 989.70; (b) he reconditions them, or; (c) he has them in his possession for the purpose of inspection, and provided further, that the term shall apply only to the handler who first acquires the raisins.

7 C.F.R. § 989.17. This definition is not ambiguous. Plaintiffs "acquire" raisins if they "obtain physical possession of raisins ... at [the] packing or processing plant ... operated by [them]." The definition cannot be interpreted reasonably to required a sale of goods under the UCC, as Plaintiffs argue. The plain and unambiguous definition of "acquire" requires "physical possession" at a packing facility; it does not require the transfer of legal title.

Reasonable inferences made from substantial evidence support the JO's conclusion that Plaintiffs acquired raisins. The JO noted: "The record does not contain direct evidence that Mr. Horne and partners 'received' raisins but there is ample evidence that they 'packed-out' raisins (CX 82–CX 87). Logic allows me to conclude that raisins cannot be 'packed-out' unless they are received." AR 677, n. 4. Under the same sound logic, this Court finds that substantial evidence supports the JO's finding that Plaintiffs acquired raisins during the 2002–2003 and 2003–2004 crop years. The uncontroverted evidence demonstrates that Plaintiffs stemmed, sorted, cleaned and packaged raisins at Lassen Vineyard's plant. During the hearing, the USDA introduced evidence that Plaintiffs, in their operation of Lassen Vineyards and using Raisin Valley Farms' handler number stamp, "packed out" more than 1.2 million pounds of raisins during the 2002–2003 crop year and more than 1.9 million pounds of raisins for the 2003–2004 crop year. This evidence supports the logical conclusion that Plaintiffs has physical possession of, and thus acquired, those raisins that they handled and packed out at Lassen Vineyards.

3. USDA Opinion Letters were Consistent with the JO's Decision

Plaintiffs contend that an April 23, 2001 letter from Robert Keeney of USDA–AMS Fruit and Vegetable Programs ("Keeney Letter") "should be dispositive of this case." The Keeney Letter reads:

> In your letter, you indicated that Raisin Valley Farms has entered into an agreement with Del Rey Packing Company (Del Rey) whereby Del Rey will "custom pack" all of Raisin Valley's organic raisin crop. Del Rey will perform "packer" functions on Raisin Valley Farms' raisins such as stemming, sorting, and seeding. Del Rey will also ensure that the raisins are inspected but will not take title to the raisins ...
>
> [I]n this situation you described, you are correct that Raisin Valley Farms would be neither a packer nor a handler under the order.

AR 6316–17. Plaintiffs interpret this letter to opine that Raisin Valley Farms would not be a handler in the situation where Raisin Valley Farms uses a custom packer to pack its raisins, and would not be a handler under facts of this action. Plaintiffs argue that the USDA "cannot have it both ways, and be situational about when it will, and will not, treat one of the Respondents as a 'handler' or 'packer.' "

The USDA points out that Plaintiffs "omit any mention of the critical part of the [Keeney] letter and misconstrue entirely its importance in this case." The

Keeney Letter was a response to a March 15, 2001 letter that Plaintiffs wrote to the USDA in which Plaintiffs advised the USDA that "Raisin Valley Farms has entered into an arrangement whereby Del Rey Packing will 'custom pack' in 50 pound boxes the certified 100% organic raisin crop produced by Raisin Valley Farms." AR 6316–17. Plaintiffs further informed the USDA in their letter that:

> Raisin Valley Farms will not stem, sort, seed, or grade its organic raisin crop. That will be accomplished pursuant to the "custom packing" arrangement entered into between Raisin Valley Farms and Del Ray Packing ... Del Rey Packing will not take title, will not place any of Raisin Valley Farms' raisins in its inventory, and will not sell any portion of Raisin Valley Farms' organic raisin crop. It will merely "custom pack" on behalf of Raisin Valley Farms. As such, Raisin Valley Farms does not fall within the definition of a "packer" under ... the Raisin Marketing Order.

Id. Plaintiffs asked the USDA to "advise if your interpretation of ... the ... Marketing Order is inconsistent with the intent of the marketing program as interpreted by Raisin Valley Farms." *Id.* The Keeney Letter was written in response to Plaintiffs' March 2001 letter to address the hypothetical situation therein described. And while the Keeney Letter opines that Raisin Valley Farms would not be handler or packer under that hypothetical situation, Plaintiffs omit the following key passage:

> Rather, Del Rey would be a packer and handler. Del Rey would acquire Raisin Valley Farms' raisins, and would further be required to meet the order's obligations regarding volume regulation, quality control, payment of assessments to the Raisin Administrative Committee (RAC), and reporting requirements.

AR 6316–17.

From this letter exchange, three points emerge. First, the USDA made clear that it would consider a custom or toll packer to be a handler that would be required to fulfill the Marketing Order obligations. The evidence supports, and Plaintiffs do not deny, that Lassen Vineyards performed "packer" functions on Raisin Valley Farms' raisins, such as stemming, sorting, and seeding. Thus, the USDA's opinion in the Keeney Letter is consistent with the JO's opinion; to wit, an entity that custom packs raisins is a handler and has a duty to meet the obligations under the Marketing Order.

Second, the Keeney Letter informed Plaintiffs that transfer of title was irrelevant to whether the custom packer was considered to be a handler under the Marketing Order. In their letter, Plaintiffs proposed that Del Rey will not place any of Raisin Valley Farms' raisins in its inventory, will not sell any portion of Raisin Valley Farms' organic raisin crop, and will not take title. Plaintiffs proposed that Del Rey would merely "custom pack" on behalf of Raisin Valley Farms. Under this scenario, the Keeney Letter concluded that Del Rey would be a packer and handler subject to the provisions of the Marketing Order. Thus, Plaintiffs were on notice since 2001

that a packer acquires raisins even if there is no transfer of title.[7]

Third, Plaintiff's reliance on this hypothetical scenario is inapposite, because it describes a situation that is incongruent with the evidence. Plaintiffs hypothesized a situation in which they would perform none of the handler or packer functions. Instead, Raisin Valley Farms would pay an unrelated third-party (Del Rey) to stem, sort, seed and grade the raisins. Under this scenario, the raisin producer would not be a handler. As set forth above, however, Raisin Valley Farms and Lassen Vineyards collectively packed raisins during the 2002–2003 and 2003–2004 crop years, and charged others for that packing service. To the extent that Raisin Valley Farms and Lassen Vineyards produced raisins, they were not subject to the Marketing Order. But, to the extent that Raisin Valley Farms and Lassen Vineyards custom packed raisins for themselves and others, they were subject to the Marketing Order as handlers. The latter activities are the subject of this action, and the latter subjects Plaintiffs to the Marketing Order. In sum, Plaintiffs are correct that the Keeney Letter "should be dispositive;" however,

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[7] Although the term "acquire" is unambiguous, this Court would defer to the USDA's interpretation of the meaning of the term if it were. *Barnhart v. Walton*, 535 U.S. 212, 218 (2002) ("Courts grant an agency's interpretation of its own regulations considerable legal leeway."); *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (To the extent that a regulation is ambiguous, the agency's interpretation of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation."). Here, the USDA consistently interpreted the meaning of the term "acquire" to include the scenario proposed, and ultimately pursued, by Plaintiffs.

the disposition of Plaintiffs' claims based on an accurate reading of this letter exchange and the evidence favors the USDA.

4. Evidence Supports Liability of both Lassen Vineyards and Raisin Valley Farms

In opposition to the USDA's summary judgment motion, Plaintiffs assert that the "USDA failed ... to assert substantial specific facts as to each 'Respondent' (Plaintiffs herein) that would justify that that specific person or a specific entity was a 'handler' and a handler who 'acquired' raisins and thus subject to the substantial (in this case massive) penalties under the AMAA." The Court notes that the JO used the terms Raisin Valley Farms, Lassen Vineyards, Mr. Horne, and "Mr. Horne and partners" interchangeably in its Initial Decision. At different points of the opinion, the JO found that Raisin Valley, Lassen Vineyards, and "respondents" individually engaged in the handling of raisins and violated the Marketing Order. Ultimately, the JO imposed sanctions against both Raisin Valley Farms and Lassen Vineyards. In the Reconsideration Order, the JO refers to the respondents through the term "Mr. Horne and partners" only. AR 757–778. The JO's findings and orders depart from the ALJ's order that imposed sanctions against Lassen Vineyards only. Plaintiffs contend that there was no evidence presented that any entity handled, packed or acquired raisins.

While this Court finds that the evidence supports the ALJ's conclusion that Lassen Vineyards was the handler of raisins and violated the Marketing Order, this Court will not disturb the JO's orders. For the following reasons, this Court finds that there is "such

relevant evidence as a reasonable mind might accept as adequate to support" the JO's conclusion. *Pierce*, 487 U.S. at 565. Because the record supports more than one rational interpretation of the evidence, the Court will defer to the JO's decision, *Bayliss*, 427 F.3d at 1214 n. 1, and will not substitute its judgment for the JO's opinion. *Marsh*, 490 U.S. at 378.

First, this Court agrees with the JO to find "Mr. Horne's business structure confusing at best." AR 685. As the JO explained:

> There appear [sic] to be three main entities, Raisin Valley Farms, Lassen Vineyards, and Raisin Valley Farms Marketing Association. The main problem is that at various times Mr. Horne uses the name "Raisin Valley Farms" for each. Without Mr. Horne's personal knowledge, it is impossible to know which bank account in the name of Raisin Valley Farms is the account for which company. In fact, there was not a bank account in the name of Lassen Vineyards.

AR 685. The following findings of fact represent the interplay between the three entities:

> When Raisin Valley Marketing Association received an order for raisins, Mr. Horne contacted one of the Raisin Valley Marketing Association members inquiring if the member would accept the price offered. When Mr. Horne found a grower willing to accept the order, he told

> that grower to bring the raisins to Lassen Vineyards' packing plant to be stemmed, sorted, cleaned, graded, and packaged. The buyer picked up the packaged raisins and left a bill of lading. When the buyer paid for the raisins, Mr. Horne deposited the funds into an account. Originally, the funds were deposited into an account in the name of Mr. and Mrs. Horne. Mr. Horne changed the account to one named "Raisin Valley Farms Marketing, LLT." Now, Raisin Valley Marketing Association has a "bone fide Association bank account" from which Mr. Horne, for Raisin Valley Farms Marketing Association, disburses funds to Lassen Vineyards, the brokers, and the growers.

AR 674–75. Moreover, the JO found that the confusion of the parties was caused, in significant part, by Mr. Horne's untimely and incomplete production of records. AR 684–85. The JO found that evidence established that the Plaintiffs "play[ed] a kind of shell game with interlocking partnerships and a marketing association to try to conceal their role as first handler." AR 775. Based on Mr. Horne's testimony, in which he interchanged the entities, intermingling of funds, absence of separate bank accounts, and intermingling of duties between the entities, this Court finds that substantial evidence supports the JO's decision against both Raisin Valley Farms and Lassen Vineyards.

Second, substantial evidence supports the JO's finding that Raisin Valley Farms took direct part in the handling and packing of raisins. The Hornes,

under the name of Raisin Valley Farms, filed RAC–5 forms during the 2001–2002, 2002–2003, and 2003–2004 crop years, "notifying the RAC of their intention to handle raisins as a packer under the Raisin Order." AR 670. "All of the raisins packed by Lassen Vineyards in crop years 2002–2003 and 2003–2004 were packaged in boxes stamped with the handler number 94–101. That number had been assigned to Marvin D. Horne and Laura R. Horne" doing business as Raisin Valley Farms. AR 671. Because all of the raisins packed out of Lassen Vineyards were stamped with Raisin Valley Farms' handler number, it was not unreasonable to conclude that Raisin Valley Farms handled and acquired raisins.

5. Plaintiffs were subject to the Marketing Order notwithstanding their "Lease" Arrangement

Plaintiffs contend that the Marketing Order regulates "[o]nly genuine handlers," and "does not reach equipment lessors." Plaintiffs describe the evidence as follows:

> Yes, there was evidence that Lassen Vineyards leased employees for the purpose of packing raisins and that it also leased equipment to farmers, including the Hornes and Durbahn [sic] so they can pack their own raisins but the Durbahns and Hornes were simply producers, not handlers, and Lassen Vineyards, acting as a lessor of labor and equipment and without putting raisins in the stream of interstate commerce or selling said

> raisins do not make them handlers, not packers, nor processors, nor is evidence of "acquiring" raisins.

Pl. Reply, 4:5–10. The Court finds that the JO correctly rejected Plaintiffs' arguments.

In his testimony, Mr. Horne testified that for a fee, his "family" packing operation "furnished equipment and employees to run the equipment." AR 1669. Lassen Vineyards owned the land, structures, and equipment of the packing plant. AR 1938–40. Lassen Vineyards did not have a separate bank account from the Hornes, Raisin Valley Marketing, or Raisin Valley Farms. AR 2034.

Substantial evidence adduced at the hearings demonstrate that Plaintiffs performed the functions of a handler. According to Mr. Horne's testimony, raisin producers paid Lassen Vineyards through Raisin Valley Marketing and Raisin Valley Farms to send their raisins "through the line; the cap stems are removed; the raisins are washed; they're vacuumed; substandard is removed; sticks, stems, rocks, and any ... foreign material." AR 1668. The raisins at Lassen Vineyards then go:

> through an observation line where employees remove something that may not have been vacuumed out or a berry or raisin that may have mold on it. And from there, it goes into a scale where it's weighed and put into a box with liner—a food grade plastic liner. And the box is then put through taping machine, where it is sealed. And then it goes through another metal detector with a marking

> device that puts on the side of the box the date, the time packed, the packer number assigned to me, and the lot number of the grower or the customer.

AR 1669–70. Mr. Horne testified that his operation charged raisin producers a fee for the "use of the facility, the labor, the fiber, the plastic [used to package the raisins]." AR 1943. While Mr. Horne may characterize this arrangement as a lease, the evidence demonstrates that Plaintiffs were paid a fee to handle raisins that they had physical possession of in their packing plant, thus subjecting them to the Marketing Order.

Mr. Horne's testimony also revealed that the employees who operated Lassen Vineyards' equipment were employees of Plaintiffs, despite Mr. Horne's efforts to obscure this fact by creating another "leasing" agreement. It is undisputed that Mr. Durbahn supervised and Marvin managed the Lassen Vineyards plant. Plaintiffs assert that the raisin producers packed their own raisins or leased employees who were not associated with the partnership. However, there is no evidence that anyone other than employees of Lassen Vineyards worked at the plant. Moreover, the "leasing employer[s]" of the employees were Ms. Horne and Ms. Durbahn, and most of the employees worked on Lassen Vineyards land.

Legally and factually, Plaintiffs were handlers subject to the Marketing Order despite the "leasing" agreements. No language in the AMAA or Marketing Order provides an exemption for an entity that performs the functions of a handler under a leasing agreement. Plaintiffs fail to support their argument

that lessors of labor and equipment are exempt from the Marketing Order. The substantial evidence establishes that Plaintiffs were handlers, notwithstanding the various entities and lease agreement arrangements. The evidence supports the JO's conclusion that Plaintiffs were playing "a kind of shell game with interlocking partnerships and a marketing association to try to conceal their role as first handler." AR 775. The evidence further supports the JO's conclusion that "Marvin Horne and partners put in place a scheme to enhance their profitability by avoiding the requirements of the Raisin Order. By so doing, they obtained an unfair competitive advantage over everyone else in the raisin industry who complied with the Raisin Order." AR 694.

6. Raisin producers are exempt from the Marketing Order in their capacity as producers, not in their capacity as handlers

Plaintiffs contend that as producers, they are exempt from the Marketing Order. As set forth above, the AMAA and the Marketing Order impose obligations on handlers, not producers. The AMAA specifically excludes producers from regulation pursuant to the Marketing Order. 7 U.S.C. § 608c(13)(B). More specifically, the AMAA provides that a marketing order does not apply to "any producer *in his capacity as producer.*" 7 U.S.C. § 608c(13)(B) (emphasis added).

The exemption of 7 U.S.C. § 608c(13)(B) applies to Raisin Valley Farms and Lassen Vineyards in their capacities as raisin producers, but does not provide an exemption from the Marketing Order in their capacities as handlers. "The language 'in his capacity as * * * ' limits the exemption [.]" *Acme Breweries v.*

Brannan, 109 F. Supp. 116, 188 (N.D. Cal. 1952) (holding that hops producer was exempt from regulation as a producer under § 8c(13)(B) of the Act, but that it could be regulated as a handler since it did something to the hops other than grow them). Based on the express and explicit limiting clause, Plaintiffs are only exempt from the Marketing Order in their capacity as producers of raisins. *See Ideal Farms, Inc. v. Benson*, 288 F.2d 608, 614 (3d Cir. 1961), *cert. denied*, 372 U.S. 965 (1963) ("Other provisions of this section of the Act explicitly recognize that a person or business entity may be engaged in the milk business in more than one capacity and that a producer is exempt from regulation only in his capacity as a producer.") (citing 7 U.S.C. § 608c(13)(B)); *see also, United States v. United Dairy Farms Co-op. Ass'n*, 611 F.2d 488, 491 n. 7 (3rd Cir. 1979) ("producers who also function as handlers ... are subject to regulation under the milk marketing order); *Freeman v. Vance*, 319 F.2d 841, 842 (5th Cir. 1963) (same). As the administrator's action against Plaintiffs focuses on Plaintiffs' activities as handlers, the 7 U.S.C. § 608c(13)(B) exemption is inapplicable. *See Lion*, 416 F.3d at 1360 ("Although producers are not directly bound by the statute, 7 U.S.C. § 608c(13)(B), under the specific terms of the Raisin Marketing Order, all persons seeking to market California raisins out-of-state are deemed handlers and must comply with the Order.")

In opposition, Plaintiffs repeat the assertion that "no one at USDA advised the Plaintiffs that [their proposed activities] would violate the Marketing Order." To the contrary, the USDA advised Plaintiffs on *multiple* occasions that a raisin producer who performs handling functions upon his or her own

crop is subject to the Marketing Order. Additionally, the administrator and the RAC advised Plaintiffs that their proposed activities would fall within the Marketing Order regulations. Accordingly, Plaintiffs' assertion is insincere at best.

In addition to the Keeney Letter above, the USDA sent Plaintiffs advisory letters to interpret the Marketing Order regulations as they relate to Plaintiffs' proposed activities. In a January 18, 2002 letter, Maureen T. Pello, Senior Marketing Specialist in the Fresno, California Field Office of the AMS informed Mr. Horne that his proposed activities would make him a handler under the Marketing Order:

> As we discussed, based upon your description of your proposed activities, you would be considered a handler under the Federal Marketing Order for California raisins ... As a handler, you would be required to meet all of the order's regulations regarding volume control, quality control (which includes incoming and outgoing inspections), assessments, and reporting to the Raisin Administrative Committee.

AR 6329. On May 20, 2002, the administrator (AJ Yates) responded to an inquiry from the Hornes with the following message:

> You indicate in your correspondence that you plan to pack and market your own raisins. Such activities would make you a handler under the order. As a handler,

> you would be required to meet all of the order's regulations ... Those who pack raisins are handlers under the order.

AR 6330–31. A year later, the administrator reiterated this point in response to another letter from the Hornes. The administrator wrote: "You state that 'handler producer' raisins are not acquired and therefore are not subject to the order's reserve requirements. This is not accurate. Handlers who produce and handle raisin production are subject to marketing order requirements, including reserve requirements." AR 6373–74.

The RAC also advised Mr. Horne that he is not exempt from the Marketing Order as a producer if he handles raisins. On January 21, 2002, the RAC's Director of Compliance advised Mr. Horne in a letter that a handler is not exempt from the Marketing Order even if he or she is a producer. AR 2444–45. Notably, the Director of Compliance explained: "More than half of the recognized handlers on the RAC Raisin Packer list are also producers of raisins," and that those handler-producers comply with the Marketing Order's requirements. *Id.*

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7. Farmer to Consumer Direct Marketing Act is inapplicable

Plaintiffs contend that they were exempt from the Marketing Order because their activities were in compliance with the Farmer to Consumer Direct Marketing Act, 7 U.S.C. § 3001 et seq. ("Farmer to Consumer Act"), passed by Congress forty years after the AMAA. Plaintiffs assert that the Farmer to Consumer Act is a "national policy that encouraged producers' circumvention of packers and middlemen." The Farmer to Consumer Act's statement of purpose declares:

> It is the purpose of this chapter to promote, through appropriate means, and on an economically sustainable basis, the development and expansion of direct marketing of agricultural commodities from farmers to consumers. To accomplish this objective, the Secretary of Agriculture (hereinafter referred to as the "Secretary") shall initiate and coordinate a program designed to facilitate direct marketing from farmers to consumers for the mutual benefit of consumers and farmers.

7 U.S.C. § 3001. Plaintiffs argue that the JO erred to impose assessments and penalties of nearly $700,000 "for selling raisins directly to the consumer, avoiding the 'middle man' as Congress directed the Secretary to implement in 1976 through 7 U.S.C. § 3001."

The USDA contends that the JO correctly rejected Plaintiffs' argument that the Farmer to Consumer Act creates an exemption to the Marketing Order.

The USDA argues that Plaintiffs may not rely on the Farmer to Consumer Act for two reasons. First, the USDA maintains that nothing in the language of the Farmer to Consumer Act creates an exemption to the Marketing Order. Second, the USDA asserts that Plaintiffs offered no evidence that their activities were within the meaning of the Farmer to Consumer Act. As discussed below, both of the USDA's arguments are meritorious.

Both the ALJ and the JO found Plaintiffs' argument related to the Farmer to Consumer Act "patently specious." AR 772. This Court agrees. The ALJ and JO concluded that the Farmer to Consumer Act does not exempt raisin producers from the requirements of the Marketing Order. In this appeal, Plaintiffs have failed to articulate why this conclusion is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The USDA points out that nothing in the language of the Farmer to Consumer Act creates an exception to the Marketing Order. Plaintiffs repeat their position that they are exempt from the Marketing Order pursuant to the Farmer to Consumer Act, but cite no authority to support their position. Without authority or argument to support their position, Plaintiffs fail to carry their burden to identify the fault in the JO's reasoning and conclusion. *See, Save Our Heritage, Inc.*, 269 F.3d 49. Accordingly, the JO's decision that the Farmer to Consumer Act does not exempt Plaintiffs from the requirements of the Marketing Order is not clearly erroneous.

Moreover, even if the Farmer to Consumer Act did create an exemption to the Marketing Order for

raisin producers, Plaintiffs failed to establish that their activities fell within the Farmer to Consumer Act or its goals. The Farmer to Consumer Act defines "direct marketing" from farms to consumers as:

> the marketing of agricultural commodities at any marketplace (including, but not limited to, roadside stands, city markets, and vehicles used for house-to-house marketing of agricultural commodities) established and maintained for the purpose of enabling farmers to sell (either individually or through a farmers' organization directly representing the farmers who produced the commodities being sold) their agricultural commodities directly to individual consumers, or organizations representing consumers, in a manner calculated to lower the cost and increase the quality of food to such consumers while providing increased financial returns to the farmers.

7 U.S.C. § 3002. Pursuant to this statutory definition, Plaintiffs would need to sell their raisins "directly to individual consumers" in marketplaces such as "roadside stands, city markets," farmer's markets, and the like to fall within the Farmer to Consumer Act. *Id.* Plaintiffs introduced no evidence to support their repeated claim that the raisins packed at Lassen Vineyards were sold directly to consumers. To the contrary, the evidence submitted led the JO's reasonable conclusion that: "Mr. Horne and partners sold raisins in wholesale packaging and

quantities, frequently to candy makers and other food processors as ingredients for other food products. Mr. Horne and partners showed no connection between their business activities and the goals of the Farmer–to–Consumer Direct Marketing Act." AR 772. As the USDA points out, the evidence introduced during the administrative hearing established that Plaintiffs' raisins were packaged in large cases (AR 1740–41) and sold in large quantities-often tens of thousands of pounds-to commercial food companies. E.g., AR 2458 (invoice from Raisin Valley Farms to New York candy company for 1,160 twenty-five-pound cases of raisins); AR 2724 (invoice to Canadian food company for 1,190 thirty-pound cases of raisins); AR 2732 (invoice to Pennsylvania nut products company for 1,400 thirty-pound cases of raisins); AR 2863 (invoice to baking company for 700 thirty-pound cases of raisins). Plaintiffs offer no evidence to refute these invoices and offer no evidence that Plaintiffs sold raisins directly to consumers. Accordingly, the substantial evidence of the administrative record supports the JO's conclusion that the Farmer to Consumer Act was inapplicable to Plaintiffs and their activities during the 2002–2003 and 2003–2004 crop years.

B. Whether the penalties imposed violate the Excessive Fines Clause of the Eighth Amendment

Plaintiffs contend that the assessments and penalties imposed by the JO violate the Excessive Fines Clause of the Eighth Amendment to the United States Constitution. Plaintiffs argue that the imposition of "almost $700,000—for selling raisins

directly to the consumer, avoiding the 'middle man' as Congress directed," is an excessive fine because: (1) the USDA cannot demonstrate "harm" from Plaintiffs' activities; (2) Plaintiffs' actions were in compliance with the Farmer to Consumer Act; and (3) Plaintiffs "used every available means to determine in advance whether or not what they anticipated and proposed doing was an alleged violation of the Marketing Order."

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., Amdt. 8. The word "fine" within this amendment has been interpreted to mean "a payment to a sovereign as punishment for some offense." *United States v. Bajakajian*, 524 U.S. 321, 328 (1998) (quoting *Browning–Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989)). The Excessive Fines Clause thus "limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense." *Austin v. United States*, 509 U.S. 602, 609–610 (1993) (emphasis deleted); *see also, Enquist v. Oregon Dep't of Agric.*, 478 F.3d 985, 1007 (9th Cir. 2007) (Excessive Fines Clause applies to a government action that constitutes a punishment for an offense). Pursuant to *Bajakajian, supra*, a fine is unconstitutionally excessive if it is "grossly disproportional to the gravity of the defendant's offense." 524 U.S. at 334–35. "Excessive fines challenges involve a two-step inquiry: (1) whether the Excessive Fines Clause applies, and (2) if so, whether the fine is 'excessive.'" *Enquist*, 478 F.3d at 1006 (citing *Bajakajian*, 524 U.S. at 334).

The JO imposed three distinct remedies against Plaintiffs: (1) an order to pay the RAC $483,843.53 pursuant to 7 C.F.R. § 989.166(c); (2) an order to pay the RAC $8,783.39 in assessments pursuant to 7 C.F.R. § 989.80(a); and (3) civil penalties in total of $202,600 pursuant to 7 U.S.C. § 608c(14)(B). Plaintiffs' Eighth Amendment arguments are the same for each of the three penalties and assessments, and Plaintiffs assert that the entire sum is unconstitutional. Nevertheless, this Court considers Plaintiffs' challenge as it applies to each remedy under each regulation to determine whether the Excessive Fines Clause applies and, if so, whether the fine was excessive.

When reviewing the JO's choice of sanctions, this Court is limited to determining "whether, under the pertinent statute and relevant facts, the Secretary made an allowable judgment in choice of remedy." *Balice*, 203 F.3d at 689 (citing *Farley & Calfee, Inc. v. U.S. Dep't of Agric.*, 941 F.2d 964, 967 (9th Cir. 1991)). This Court will not overturn a penalty unless it is either "unwarranted in law or unjustified in fact." *Bosma v. U.S. Dep't of Agric.*, 754 F.2d 804, 810 (9th Cir. 1984) (citing *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 185–88 (1973)).

1. Reserve requirement compensation

The JO ordered Plaintiffs to pay $483,843.53 to the RAC, pursuant to 7 C.F.R. § 989.166(c), which reads:

> **Remedy in the event of failure to deliver reserve tonnage raisins.** A handler who fails to deliver to the Committee, upon request, any reserve tonnage raisins in the quantity and

> quality for which he has become obligated ... shall compensate the Committee for the amount of the loss resulting from his failure to so deliver ... The amount of compensation for any shortage of tonnage shall be determined by multiplying the quantity of reserve raisins not delivered by the latest weighted average price per ton received by producers during the particular crop year for free tonnage raisins of the same varietal type or types[.]"

Id. Pursuant to this regulation, the JO multiplied the quantity of the reserve raisins Plaintiffs failed to deliver for crop years 2002–2003 and 2003–2004 by the applicable average prices per ton to arrive at the total penalty. Plaintiffs do not challenge the JO's calculation of the fine. Rather, Plaintiffs argue that the penalty violates the Excessive Fines Clause because the USDA failed to demonstrate a harm in the amount of $483,843.53.

The USDA argues successfully that the Excessive Fines Clause is inapplicable to the penalty imposed based on 7 C.F.R. § 989.166(c), because the regulation is compensatory, not punitive. The plain language of the statute makes clear that this provision requires a handler who fails to deliver reserve raisins to "*compensate* the Committee *for the amount of the loss* resulting from his failure to deliver." 7 C.F.R. § 989.166(c) (emphasis added). Compensating the government for a loss serves a remedial purpose, but is not punitive. *Bajakajian*, 524 U.S. at 328 (citing Black's Law Dictionary 1293 (6th ed. 1990) ("[R]emedial action" is one "brought to

obtain compensation or indemnity")). By its terms, the penalty pursuant to 7 C.F.R. § 989.166(c) compensates the RAC for lost revenues and recovers the value that Plaintiffs failed to deliver into the reserve pool. Thus, the penalty imposed, which allows the USDA to recover from Plaintiffs the dollar equivalent of the California raisins that Plaintiffs failed to hold in reserve for crop years 2002–2003 and 2003–2004, is remedial rather than punitive. *See, One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 237 (1972) (monetary penalty provides "a reasonable form of liquidated damages" to the Government and is thus a "remedial" sanction because it compensates Government for lost revenues). Because 7 C.F.R. § 989.166(c) is a remedial provision, the JO's order based on that regulation does not impose a "fine" subject to the Excessive Fines Clause.[8]

2. Assessment payment

The JO ordered Plaintiffs to pay $8,783.39 in assessments for the 2002–2003 and 2003–2004 crop years, pursuant to 7 C.F.R. § 989.80(a), which reads:

> Each handler shall, with respect to free tonnage acquired by him ... pay to the [RAC], upon demand, his pro rata share of the expenses ... which the Secretary finds will be incurred, as aforesaid, by the [RAC] during each crop year ... Such

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[8] Even if the Excessive Fines Clause applies to the challenged regulation, the fine imposed by the JO does not violate the Eighth Amendment because the fine is not "excessive," as explained more fully *infra*.

> handler's pro rata share of such expenses shall be equal to the ratio between the total free tonnage acquired by such handler ... during the applicable crop year and the total free tonnage acquired by all handlers during the same crop year.

The JO multiplied the established assessment rate of $8 per ton by the established free tonnages to determine the total assessments due for the 2002–2003 and 2003–2004 crop years. Plaintiffs do not challenge the JO's calculation of the assessments.

Similar to the challenge above, Plaintiffs argue that the JO's order to pay $8,783.39 was an excessive fine because the USDA failed to demonstrate harm. Plaintiffs argue that they were not handlers, were not subject to the Marketing Order, and the JO's order is a "post hoc vendetta against Plaintiffs" by the USDA to punish Plaintiffs for activities that comply with the Farmer to Consumer Act.

The USDA contends that the remedy under 7 C.F.R. § 989.80(a), like 7 C.F.R. § 989.166(c) discussed above, is compensatory. The USDA argues that the JO's order to pay $8,783.39 in assessments was designed to compensate the RAC for Plaintiffs failure to pay the assessments, as required by the Marketing Order. The USDA concludes that 7 C.F.R. § 989.80(a) is not subject to the Excessive Fines Clause.

The provision that requires handlers to pay assessment to the RAC, 7 C.F.R. § 989.80(a), is not punitive in nature; the assessments are levied to fund the RAC and its operations. *See Evans v. United States*, 74 Fed. Cl. 554, 557 (2006), *aff'd by*

Evans v. United States, 250 Fed. Appx. 321 (Fed. Cir. 2007). As set forth above, the RAC receives no federal appropriations. The RAC is funded by the assessments levied on handlers pursuant to 7 C.F.R. § 989.80(a) and from the proceeds of sales of the reserve raisins withheld from the open market. *Evans*, 74 Fed. Cl. at 557 (citing 7 C.F.R. §§ 989.53, 989.79, 989.80(a), 989.82). Under this regulation, the Marketing Order requires all raisin handlers to pay assessments to the RAC to fund the RAC and its operations. The obligation to pay is automatic and is triggered by a handler's acquisition or receipt of raisins; it requires no culpability. *C.f.*, *Bajakajian*, 524 U.S. at 328 (forfeiture of currency is punishment because it is a an "additional sanction ... imposed at the culmination of a criminal proceeding and requires conviction of an underlying felony"). Thus, assessments are not imposed on handlers as a punishment for an action. Because 7 C.F.R. § 989.80(a) a funding regulation that is not punitive in nature, the JO's order based on that regulation does not impose a "fine" subject to the Excessive Fines Clause.

3. Civil Penalties

In addition to the compensatory assessments and penalties above, the JO imposed civil penalties totaling $202,600 against Plaintiffs pursuant to 7 U.S.C. § 608c(14)(B), which reads:

> Any handler subject to an order issued under this section ... who violates any provision of such order may be assessed a civil penalty by the Secretary not exceeding $1,000 for each such violation.

> Each day during which such violation shall be deemed a separate violation ... The Secretary may issue an order assessing a civil penalty under this paragraph only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable in the district courts of the United States in any district in which the handler subject to the order is an inhabitant, or has the handler's principle place of business. The validity of such order may not reviewed in an action to collect such civil penalty.

Neither party disputes that this provision is punitive in nature, designed to punish a handler who violates any provision of the Marketing Order. Thus, the civil penalty is a "fine" within the meaning of the Excessive Fines Clause.

Because the JO imposed a "fine" pursuant 7 U.S.C. § 608c(14) (B), this Court must determine whether the fine imposed was excessive. A fine is unconstitutionally excessive if it is "grossly disproportional to the gravity of the defendant's offense." *Bajakajian,* 524 U.S. at 334–35. "Whether a penalty is grossly disproportionate calls for the application of a constitutional standard to the facts of a particular case, and in that context, de novo review is appropriate." *Balice,* 203 F.3d at 698.

The JO found that Plaintiffs committed the following violations:

- Twenty violations of section 989.73 of the Raisin Order (7 C.F.R. § 989.73) by filing

inaccurate forms with the RAC on 20 occasions.

- Fifty-eight violations of section 989.58(d) of the Raisin Order (7 C.F.R. § 989.58(d)) by failing to obtain incoming inspections of raisins on 58 occasions.

- Two violations of 989.80 of the Raisin Order (7 C.F.R. § 989 .80) by failing to pay assessments to the RAC in crop year 2002–2003 and crop year 2003 and 2004.

- Five hundred ninety-two violations of sections 989.66 and 989.166 of the Raisin Order (7 C.F.R. §§ 989.66, .166) by failing to hold raisins in reserve and by failing to pay the RAC the dollar equivalent of the raisins not held in reserve.

- One violation of section 989.77 of the Raisin Order (7 C.F.R. § 989.77) for failing to allow access to Plaintiffs' records.

To deter Plaintiffs from continuing to violate the Marketing Order, and to deter others from similar future violations, the JO concluded that the following civil penalties for these violations were "appropriate" and "sufficient": (1) $300 per violation for filing inaccurate reporting forms; (2) $300 per violation for the failure to obtain incoming inspections; (3) $300 per violation for failing to pay the assessments; (4) $300 per violation for failure to hold raisins in reserve; and (5) $1000 for the failure to allow access to records.

When determining whether fines are excessive, the Court first considers that "judgements about appropriate punishment for an offense belong in the

first instance to the legislature." *Balice,* 203 F.3d at 699 (quoting *Bajakajian,* 524 U.S. at 336) (citing *Solem v. Helm,* 463 U.S. 277, 290 (1983)). The USDA points out that the civil penalties imposed by the JO fall well below the level authorized by Congress. As set forth above, Congress authorized civil penalties up to $1,000 for each violation. In addition, Congress mandated that "[e]ach day during which such violation continues shall be deemed a separate violation." 7 U.S.C. § 608c(14)(B). The JO found 673 separate violations, spanning over a two year period of time. Thus, the JO was authorized by statute to impose a civil penalty of no less than $673,000. The potential civil penalty calculation would be substantially larger if the JO imposed the maximum penalty of $1,100, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, and/or considered that each violation occurred over multiple days.[9] Considering the fine in total, $202,600 is not an excessive fine to punish 673 separate violations of the Marketing Order, when the JO could have imposed a fine of $673,000 or more. The JO imposed a $300 fine for 672 violations, less than one-third of the amount authorized by statute. *C.f., Balice,* 203 F.3d 684 (finding that statutory maximum of $2,000 penalty for AMAA violation of almond marketing order was not an excessive fine for handler's failure to report, keep accurate records, and hold almonds in reserve). Accordingly, the Court finds that the

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[9] As the JO noted, the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended, 28 U.S.C. § 2461 note, adjusted the civil monetary penalty that may be assessed under the AMAA. For each violation of a marketing order, the maximum civil penalty is $1,100. 7 C.F.R. § 3.91(b)(1)(vii).

$202,600 in civil penalties assessed on Plaintiffs by the JO pursuant to 7 U.S.C. § 608c(14)(B) is not "grossly disproportional to the gravity of the [plaintiffs'] offense[s]." *Bajakajian*, 524 U.S. at 334–35.

Plaintiffs contend that the fines are excessive because: (1) the USDA cannot demonstrate "harm" to anyone caused by Plaintiffs' activities; (2) Plaintiffs' actions complied with the Farmers to Consumers Direct Marketing Act; (3) Plaintiffs were not handlers and, therefore, not subject to the Marketing Act. Plaintiffs' second and third arguments have been discussed *infra*, and are unpersuasive and inapposite to this analysis. As to Plaintiffs' argument that would require the USDA to demonstrate harm, the Ninth Circuit rejected this argument in a case similar to the one at bar.

In *Balice*, almond handlers challenged penalties imposed under 7 U.S.C. § 608c(14) as constitutionally excessive because the violations resulted in "no harm to the Government and no harm to the industry." 203 F.3d at 699. The *Balice* almond handlers committed offenses similar to those committed by Plaintiffs, and the USDA imposed fines on them pursuant to 7 U.S.C. § 608c(14) for violating the record keeping, reporting, and reserve requirements of the Almond Marketing Order, 7 C.F.R. § 981.1 et seq, a marketing order similar to the Marketing Order governing Plaintiffs. In *Balice*, the appellant almond handlers argued that the JO's decision to increase the fine from $1000 per violation to $2000 without requiring the USDA to demonstrate harm was arbitrary and capricious. In rejecting the appellant's argument, the Ninth Circuit looked at

the language of the statute and found that to require the USDA to demonstrate harm "would contravene the express terms" of the statute. *Balice*, 203 F.3d at 694. Similarly, the express terms of 7 U.S.C. § 608c(14) require the USDA to demonstrate that a handler violated the marketing order, but do not require any further demonstration. Accordingly, this Court "declines to accept [Plaintiffs'] suggestion that the USDA was required to show harm to the government before the JO could" impose a penalty pursuant to 7 C.F.R. § 989.166(c).[10] *Balice*, 203 F.3d at 694.

Moreover, Plaintiffs' arguments misrepresent Plaintiffs' conduct and culpability. As set forth above, the JO did not err to find that Plaintiffs were subject to the Marketing Order as handlers that acquired raisins. Although they were handlers, Plaintiffs filed inaccurate reports, failed to obtain inspections, failed to hold raisins in reserve, and failed to allow access to records. As the Ninth Circuit explained in *Balice*, 203 F.3d at 699, these actions threaten to cause severe consequences to the entire industry:

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[10] For this reason, the USDA was also not required to demonstrate harm before ordering Plaintiffs to compensate the RAC for the failure to hold the reserve raisins pursuant to 7 C.F.R. 989.166(c). Pursuant to the regulation, the USDA shall recover the amount of the loss from a handler who fails to deliver reserve tonnage raisins to the RAC. 7 C.F.R. § 989.166(c). No language in the regulation requires the USDA to demonstrate harm, and Plaintiffs point to no authority to construe the regulation in this way. Because Plaintiffs' suggestion that 7 C.F.R. § 989.166(c) requires the USDA to demonstrate "harm" contravenes the express terms of the regulation, this Court rejects it.

> Balice willfully failed to maintain records for important transactions ... That violation largely frustrated the USDA's attempts to ensure that Balice was complying with other provisions of the Almond Marketing Order, and it interfered with the Almond Board's ability to set its economic policy.
>
> Even worse, Balice unlawfully disposed of reserve almonds, which were lawfully salable at only $0.05 to $0.08 per pound, when the prevailing market price for the almonds was $1.40 per pound. That conduct not only resulted in an illegal profit of roughly $246,677, but it also undermined the Secretary's efforts to protect the stability of the almond market.

Similarly, the USDA has an important need to control the stability of the raisin market, as expressed in the AMAA and the Marketing Order. Like the actions of the *Balice* almond handlers, Plaintiffs' actions interfered with the RAC's ability to set its economic policy. Plaintiffs' introduction of the reserve raisins into the open market yielded illegal profits and could have resulted in market instability and a downward spiral in prices. Because of the serious nature of the Plaintiffs' conduct, with its severe and far-reaching effects, this Court finds that a $300 fine is not an excessive amount for each of Plaintiff's violations, described above, and $1,000 is not an excessive fine for Plaintiffs' failure to allow access to their records. *See, Balice*, 203 F.3d 684;

Cole v. USDA, 133 F.3d 803 (11th Cir. 1998) (holding that a $400,000 penalty, representing a forfeiture of 75% of the sale price of over-quota tobacco, was not excessive given the legislative purpose of discouraging the over-supply of tobacco in the marketplace).[11]

C. Whether the reserve requirements violate the Fifth Amendment as a physical taking without just compensation

Plaintiffs argue that the reserve raisin program of the Marketing Order, 7 C.F.R. §§ 989.65–98, constitutes a physical taking of tangible property by the government without just compensation in violation of the Fifth Amendment to the United States Constitution. Plaintiffs assert, without citation, that the "elements necessary for a takings claim are present if (1) private property, (2) is taken, (3) for public use, (4) without just compensation." Pl. Memo, 20:3–4. Without citation, Plaintiffs argue that they "routinely evidenced and argued all these elements." Plaintiffs assert that raisins are personal, private property and the government has paid no just compensation for the reserve tonnage raisins that the USDA takes each year. Plaintiffs contend that although Congress may take actions to regulate the industry, "[n]o court has ever held that the

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[11] The instant action is distinguishable from the cases relied upon by the USDA in that the JO imposed both compensatory and civil penalties and assessments on Plaintiffs. In *Balice* and *Cole*, the JO imposed penalties pursuant to either one regulation or the other, but not both. Because Plaintiffs failed to raise this point, however, the Court need not address whether the distinction changes the Excessive Fines Clause analysis.

Commerce Clause trumps, eliminates, or eviscerates the Takings Clause in a physical takings case." Thus, "[w]hile Congress may allow the permanent deprivation of a citizens [sic] physical property, the government must pay fair market value." Plaintiffs conclude: "The government can't have it both ways: it can't refuse to pay just compensation, and then penalize, monetarily, Plaintiffs for refusing to transfer title and possession to the government." *Id.* at 11, 14–16.

As introduced above, the Marketing Order creates the raisin reserve requirement program. The purpose of the reserve requirement program is to control the supply of raisins in the domestic market and, accordingly, to regulate the price of the commodity. "By regulating the amount of raisins in this market, the USDA can, in effect, regulate the price at which raisins are sold domestically." *Lion Raisins, Inc. v. U.S.*, 58 Fed. Cl. 391, 394 (2003). Accordingly, the "primary focus" of the market control program is to "maximize return to the grower." Daniel Bensing, *The Promulgation and Implementation of Federal Marketing Orders Regulating Fruit and Vegetable Crops Under the Agricultural Marketing Agreement Act of 1937*, 5 San Joaquin Agric. L.Rev. 3, 6 (1995).

The reserve requirement program is administered by the RAC. By February 15 of each crop year, the RAC must recommend to the USDA the portion of the crop that should be made available to sale without restrictions ("free tonnage") and the portion that should be withheld from the market ("reserve tonnage"). 7 C.F.R. §§ 989.54(d), 989.65. Based on the RAC's recommendations, and after obtaining the approval of two-thirds of California raisin producers,

or of producers of two-thirds of raisins "produced for market, the USDA promulgates a regulation fixing the percentages of "reserve tonnage" and "free tonnage" raisins. 7 U.S.C. §§ 608c(8) (A)-(B), 9(B)(i)-(ii); 7 C.F.R. §§ 989.55, 989.65. In *Lion III*, the court explained the reserve requirement program as follows:

> Free-tonnage raisins may be disposed of by the handler in any marketing channel. Producers receive immediate payment from handlers, at the field market price, for the free-tonnage raisins. The market price for the free-tonnage raisins, or the field price, is not set by the RAC, but is determined through a private bargaining process carried out between producers' and handlers' bargaining associations. Producers are not paid immediately for reserve raisins. Reserve-tonnage raisins are held by handlers for the account of the reserve pool, which is operated by the RAC. *Lion I*, 58 Fed. Cl. at 394. Reserve raisins are sold, as authorized by the RAC, in non-competitive outlets, such as school lunch programs. *Id.*; 7C.F.R. §§ 989.65–67. The statute provides for "the equitable distribution of the net return derived from the sale [of reserve pool raisins] among the persons beneficially interested therein." 7 U.S.C. § 608c(6)(E). The RAC is charged with selling the reserve raisins in a manner "intended to maxim[ize] producer returns and achieve maximum disposition of such raisins by

> the time reserve tonnage raisins from the subsequent crop year are available." 7 C.F.R. § 989.67(d)(1). Since the mid–1990's, the RAC has been using the reserve pool to support an industry export program that effectively blends down the cost of exported California raisins thereby allowing handlers to be price-competitive in export markets where prices are generally lower than the domestic market.

416 F.3d at 1360.

The Marketing Order requires handlers to separate raisins into two sets of bins—one for "free tonnage" and one for "reserve tonnage." 7 C.F.R. §§ 989.54, 989.55, 989.65, 989.66(b)(2). "The reserve raisins are not warehoused in any central location, but rather stored by handlers on their own premises, and are released for sale per the instructions of the RAC." *Lion III*, 416 F.3d at 1360. Title to the "reserve tonnage" portion of the producer's raisins automatically transfers to the RAC for sale in secondary, non-competitive markets. *See* 7 C.F.R. §§ 989.65, 989.66(a), (b) (1), (4). In exchange, "[p]roducers are entitled by regulation to an equitable distribution of the net proceeds from the RAC's disposition of the 'reserve tonnage' raisins." *Evans*, 74 Fed. Cl. at 557.

In crop year 2002–2003, the free tonnage was 53% and the reserve tonnage was set at 47% of a producer's crop. The RAC sold the 2002 reserve pool for $970 per ton in 2004. None of the money the RAC received was paid back to the raisin producers. For

the 2003–2004 crop year, the reserve tonnage was set at 30%.[12]

It is undisputed that every year, through the reserve requirement program, the RAC takes title to a significant portion of a California raisin producer's crop. The Court must determine here whether, as Plaintiffs argue, this constitutes a "physical taking" of their property by the government that requires just compensation under the Fifth Amendment. The federal government is liable in a Taking Clause suit for the actions of the RAC, as its agent. *Lion III*, 416 F.3d 1356. The issue of what constitutes a "taking" is a federal question governed by federal law. *Johnson v. U.S.*, 479 F.2d 1383 (Fed. Cir. 1973). To determine the meaning of "property," and what property rights exist under the Fifth Amendment, federal courts look to local state law. *Richmond Elks Hall Ass'n v. Richmond Redevelopment Agency*, 561 F.2d 1327 (9th Cir. 1977).

The Takings Clause does not prohibit the taking of private property, but instead places a condition on the exercise of that power. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005). The Fifth Amendment is designed not to limit governmental interference with property rights per se, but rather to secure compensation in the event of an otherwise proper interference amounting to a taking. *Id.* Here, the RAC takes title to Plaintiffs' reserve tonnage through the AMAA and the Marketing Order by operation of Congress's power to regulate the raisin industry

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[12] The reserve tonnage percentage changes each year, sometimes radically. For example, the reserve tonnage portion was 62.5% in 1983 and 17.5% in 2005.

through the Commerce Clause authority. *See United States v. Rock Royal Co-Op., Inc.*, 307 U.S. 533, 569, 572 (1939) (upholding AMAA as constitutional under the Commerce Clause and rejecting Fifth Amendment due process and taking contentions, because "the Congress would have, clearly, the right to permit only limited amounts of milk to move in interstate commerce, [and therefore] it might permit the movement on terms of pool settlement here provided."); *see also, Evans*, 74 Fed. Cl. at 559 (discussing *Rock Royal*). Congress's power to regulate commerce, however, "does not immunize the federal government from a takings claim under the Fifth Amendment." *Evans*, 74 Fed. Cl. at 560. Thus, "the Commerce Clause may provide the authority for a taking, but it does not negate the Fifth Amendment's command that the government, having taken a person's property, must pay just compensation." *Id.* (citing *Yancey v. United States*, 915 F.2d 1534, 1540 (Fed. Cir. 1990)).

The question presented to this Court is whether the transfer of title on the reserve tonnage raisins is a *physical* taking that requires compensation. The federal government may "take" private property, requiring just compensation, either by physical invasion or by regulation. *American Pelagic Fishing Co., L.P. v. U.S.*, 379 F.3d 1363 (Fed. Cir.), *cert. denied*, 545 U.S. 1139 (2004). *Norman v. U.S.*, 63 Fed. Cl. 231 (2003), *aff'd*, 429 F.3d 1081, *cert. denied*, 547 U.S. 1147 (2003). The distinction between a "physical" taking and a "regulatory" taking is significant. *See, Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003) (payment of compensation is required whenever the government acquires private property for a public but the text of

the Just Compensation Clause contains no comparable reference to a regulatory taking). Whereas an invasion of a person's physical property will be considered a physical taking, a "taking" is less likely to be found when a party challenges the government's interference with a property interest that arises from some public program that adjusts benefits and burdens of economic life to promote the common good. *Sadowsky v. City of New York*, 732 F.2d 312 (2nd Cir. 1984). Moreover, while physical takings are compensable, *see Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 (1982), not all regulatory takings are. *See, Outdoor Graphics, Inc. v. City of Burlington*, 103 F.3d 690 (8th Cir. 1996) (Whether particular restriction amounts to taking depends on economic impact of regulation on claimant, extent to which regulation has interfered with distinct, investment-backed expectations, and character of government regulation.). With this distinction in mind, this Court turns to Plaintiffs' argument that the reserve requirement constitutes a physical taking.

One other court has considered the issue at bar.[13] In *Evans*, 74 Fed. Cl. 554, the Court of Federal Claims considered whether the transfer of title to the reserve tonnage raisins constituted a physical taking. The *Evans* court noted that under California law, the plaintiffs "unquestionably held title to their raisins grown in their fields." 74 Fed. Cl. at 563. The court found that at the time the raisins become

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[13] For other takings claims related to the raisin Marketing Order, *see Lion Raisins v. U.S.*, 58 Fed. Cl. 391 (2003) (Lion I); *Lion Raisins v. U.S.*, 57 Fed. Cl. 435 (2003) (Lion II); and *Lion Raisins v. U.S.*, 416 F.3d 1356 (2005) (Lion III).

subject to regulation under the Marketing Order (when the handler acquires the raisins), "the producers acquired in exchange personal property consisting of cash (for the 'free tonnage' raisins) and an equitable interest in the net proceeds of the 'reserve tonnage' raisins." *Id.* The court understood this transfer, required under the Marketing Order, to render plaintiffs the following property interests: "Plaintiff producers retained a property interest in the raisins, and they retained a property interest in the proceeds from the raisins." The *Evans* court concluded that the transfer of reserve tonnage raisins was not a physical taking, because:

> although the RAC gains title to some of the raisins that plaintiffs grow, the transfer does not have the same consequences as, for example, entry by governmental officials upon their land for purposes of confiscating their rains would have. There is no physical invasion of property (citations omitted) ... nor is there any "direct appropriation of property." (citations omitted). Instead, the government is the recipient of a portion of the raisins that plaintiffs shipped to handlers subject to the marketing order.

74 Fed. Cl. at 563. In addition, the *Evans* court concluded that plaintiffs had no property interest in their reserve tonnage raisins. Without a property interest in the raisins, the Takings Clause was not implicated. The Court opined that "if plaintiffs have a takings claim, it would relate to their property interest, equitable in nature, in the net proceeds

from the disposition of the 'reserve tonnage." ' *Id.* at 564. The court's conclusion that plaintiffs have no property interest in the reserve tonnage raisins is based on the following:

> In essence, plaintiffs are paying an admissions fee or toll-admittedly a steep one-for marketing raisins. The government does not force plaintiffs to grow raisins or to market the raisins; rather, it directs that if they grow and market raisins, then passing title to their "reserve tonnage" raisins to the RAC is the admission ticket.

Id.

This Court agrees, in part, with the *Evans* ruling to find that the transfer of title to the reserve tonnage does not constitute a *physical* taking. A physical taking generally occurs occur when there is a physical occupation of a person's property by the government. *Norman v. U.S.*, 63 Fed. Cl. 231, *aff'd*, 429 F.3d 1081, *cert. denied*, 547 U.S. 1147 (2003); *Yee v. City of Escondido*, 503 U.S. 519 (1992) physical taking occurs only where the government requires a landowner to submit to the physical occupation of his land). By contrast, a "regulatory taking" in violation of the Takings Clause may occur when government action, although not encroaching upon or occupying private property, goes too far and still amounts to a taking. *Anaheim Gardens v. U.S.*, 444 F.3d 1309 (Fed. Cir. 2006); *Norman*, 63 Fed. Cl. 231 (a regulatory taking occurs when a regulation deemed necessary to promote the public interest so imposes on the owner's property rights that, in essence, it

effectuates a taking); *Allain–Lebreton Co. v. Department of Army, New Orleans Dist., Corps of Engineers,* 670 F.2d 43 (5th Cir. 1982) (Where there is no physical invasion of or physical damage to a plaintiff's property by the government, the government can be held responsible for a taking only when its own regulatory activity is so extensive or intrusive as to amount to taking.). Thus, while it is not necessary that the government actually take physical possession of property in order for there to be a "taking," a physical invasion must take place for there to be a physical taking, which includes a physical taking requires a "permanent physical occupation" on one's land. *Ridge Line, Inc. v. U.S.,* 346 F.3d 1346 (Fed. Cir. 2003); *see also, e.g., Loretto,* 458 U.S. at 421 (cable television company's installation of its cable facilities on plaintiff's property). In *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001), the Supreme Court explained the distinction:

> The clearest sort of taking occurs when the government encroaches upon or occupies private land for its own proposed use. Our cases establish that even a minimal "permanent physical occupation of real property" requires compensation under the Clause. *Loretto v. Teleprompter Manhattan CA TV Corp.,* 458 U.S. 419, 427, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). In *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922), the Court recognized that there will be instances when government actions do not encroach upon or occupy the property yet still affect and

> limit its use to such an extent that a taking occurs. In Justice Holmes' well-known, if less than self-defining, formulation, "while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking." *Id.*, at 415, 260 U.S. 393, 43 S.Ct. 158.

Id. at 617. According to the Palazzolo court, "government actions [that] do not encroach upon or occupy property yet still affect and limit" use of property are "regulatory taking[s]." *Id.*

Here, Plaintiffs do not demonstrate a physical taking of their raisins by the government. The RAC gains title of Plaintiffs' reserve tonnage raisins by operation of the federal regulation of the Marketing Order. The government does not physically invade Plaintiffs' land to take the raisins, nor does the government take physical possession of the raisins. The reserve tonnage remains in the possession of the handlers. Moreover, the transfer of title is not absolute. Plaintiffs retain an equity interest in their reserve tonnage raisins. Based on these considerations, this Court finds that Plaintiffs have failed to establish that reserve raisin program of the Marketing Order constitutes a physical taking. *See, Cienega Gardens v. U.S.*, 331 F.3d 1319 (Fed. Cir. 2003) (Loss of 96% of possible rate of return on investment was "compensable regulatory taking" under Fifth Amendment, for precluding participants in government program from prepaying their mortgages after 20 years, and barring them from unregulated rental market and other more lucrative property uses); *c.f., Rose Acre Farms, Inc. v. U.S.* 559

F.3d 1260 (Fed. Cir. 2009) (egg producer did not suffer a compensable regulatory taking when, due to USDA's salmonella regulations, approximately 43% of its table eggs were diverted to the breaker egg market, thus reducing those eggs' market value by approximately 10%).[14] Because there is no physical taking, Plaintiffs' Fifth Amendment claim fails.[15]

D. Whether the JO's dismissal of Plaintiffs' administrative petition was arbitrary, capricious, and contrary to the law

Plaintiffs attempt to challenge the JO's February 8, 2007 order on Plaintiffs' administrative petition fails, as this Court lacks subject matter jurisdiction to consider Plaintiffs' claim. As a Court of limited jurisdiction, this Court must consider whether subject matter jurisdiction exists and dismiss an action if jurisdiction is lacking. *Southern Pacific Transportation Co. v. City of Los Angeles,* 922 F.2d

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[14] Although the USDA relies on rulings related to other marketing orders to argue that Plaintiffs have no property interest in their raisins, this Court notes the distinctions between the raisin Marketing Order and the marketing orders of other commodities. Unlike most of the other marketing orders, the raisin marketing order "effects a direct transfer of title of a producer's 'reserve tonnage' raisins to the government, and it requires physical segregation of the reserve-tonnage raisins held for the government's account." *Evans,* 74 Fed. Cl. at 558. Thus, the government taking under the raisin Marketing Order is distinct and must be considered on its own facts.

[15] Although Plaintiffs do not establish a physical takings claim, Plaintiffs are not without recourse. In addition to a regulatory takings claim, and as fully explained in *Evans,* Plaintiffs have at least three other legal theories they could present to challenge the reserve requirement. 74 Fed. Cl. at 564–65.

498, 502 (9th Cir. 1990), *cert. denied,* 112 S. Ct. 382 (1991); *see also,* Fed. R. Civ. P. 12(h) (3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

Plaintiffs' appeal of the JO's dismissal of Plaintiffs' administrative petition is barred by the statute of limitations. The statutory provision for judicial review of a ruling on a petition to modify a marketing order is 7 U.S.C. 608c(15)(B), which provides:

> The District Courts of the United States ... in any district in which such handler is an inhabitant, or has his principal place of business, are hereby vested with jurisdiction in equity to review such ruling, *provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling.*

This statute is jurisdictional. *See, Kingman Reef Atoll Investments, L.L.C. v. U.S.,* 541 F.3d 1189, 1996 (9th Cir. 2008); *see also, John R. Sand & Gravel Co. v. United States,* 552 U.S. 130, 128 S.Ct. 750, 753–56, 169 L.Ed.2d 591,(2008). Thus, this Court only has jurisdiction to review a handler's 7 U.S.C. § 608c(15)(B) appeal if that appeal is filed within twenty days. The JO issued its decision on February 4, 2008. Plaintiffs initiated this action on October 14, 2008. Accordingly, Plaintiffs' untimely challenge is barred by the statute of limitations and this Court lacks jurisdiction to consider it. *See United States v. Bravo–Diaz,* 312 F.3d 995, 997 (9th Cir.2002) ("It is fundamental to our system of government that a court of the United States may not grant relief

absent a constitutional or valid statutory grant of jurisdiction."). [16] Because this Court lacks jurisdiction over Plaintiffs' cause of action related to the 7 U.S.C. 608c(15)(B) petition, this Court must dismiss it, and cannot reach the merits of the parties' arguments.

VI. CONCLUSION AND ORDER

For the foregoing reasons, the Court GRANTS defendant USDA's summary judgment motion and DENIES Plaintiffs' summary judgment motion. The clerk of court is DIRECTED to enter judgment in favor of defendant USDA and against Plaintiffs and to close this action.

IT IS SO ORDERED.

Dated: December 9, 2009

/s/Lawrence J. O'Neill
United States District Judge

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[16] In addition, Plaintiffs' challenge to the JO's dismissal of Plaintiffs' administrative petition is the subject of a separate action. In that separate action, Plaintiffs' claims were dismissed as untimely. Plaintiffs' appeal of that dismissal order is currently pending.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MARVIN D. HORNE, ET AL.,
v.
UNITED STATES DEPARTMENT OF AGRICULTURE,

JUDGMENT IN A CIVIL CASE

CASE NO: **1:08–CV–01549–LJO–SMS**

XX — Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF 12/11/2009

Victoria C. Minor
Clerk of Court

ENTERED: **December 11, 2009**

by: /s/ S. Martin
Deputy Clerk

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARVIN D. HORNE AND LAURA R HORNE, d.b.a. RAISIN VALLEY FARMS, A PARTNERSHIP, and d.b.a. RAISIN VALLEY FARMS MARKETING ASSOCIATION, a.k.a. RAISIN VALLEY MARKETING, an unincorporated association; MARVIN D. HORNE; LAURA R. HORNE; DON DURBAHN, and the ESTATE OF RENA DURBAHN, d.b.a. LASSEN VINEYARDS, a partnership,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant-Appellee.

No. 10-15270

D.C. No. 1:08-cv-01569-LJO-SMS

OPINION

Appeal from the United States District Court
for the Eastern District of California
Lawrence J. O'Neill, District Judge, Presiding

Argued and Submitted
April 14, 2011—Pasadena, California

Filed July 25, 2011

Before: Stephen Reinhardt, Michael Daly Hawkins, and Ronald M. Gould, Circuit Judges.

Opinion by Judge Hawkins

COUNSEL

Brian C. Leighton, Clovis, California, for the plaintiffs- appellants.

Benjamin B. Wagner, United States Attorney, and Benjamin E. Hall, Assistant United States Attorney, Fresno, California, for the defendant-appellee.

OPINION

HAWKINS, Senior Circuit Judge:

This appeal of a United States Department of Agriculture ("USDA") administrative decision asks us to interpret and pass on the constitutionality of a food product reserve program authorized by the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. § 601 *et seq.* ("AMAA"), and implemented by the Marketing Order Regulating the Handling of Raisins Produced from Grapes Grown in California, 7 C.F.R. Part 989 ("Raisin Marketing Order" or "the Order"), first adopted in 1949.

Farmers Marvin and Laura Horne ("the Hornes"[1]) protest the USDA Judicial Officer's ("JO") imposition of civil penalties and assessments for their failure to comply with the reserve requirements, among other regulatory infractions, contending: (1) they are producers not subject to the Raisin Marketing Order's provisions; (2) even if subject to those provisions, the requirement that they contribute a specified percentage of their annual raisin crop to the government-controlled reserve pool constitutes an uncompensated *per se* taking in violation of the Fifth Amendment; and (3) the penalties imposed for their "self-help" noncompliance with the Raisin Marketing Order violate the Eighth Amendment Excessive Fines Clause. We affirm.

BACKGROUND

I. Regulatory Framework

Raisins and other agricultural commodities are heavily regulated under federal marketing orders adopted pursuant to the AMAA, a Depression-era statute enacted in response to plummeting commodity prices, market disequilibrium, and the accompanying threat to the nation's credit system. 7 U.S.C. § 601 *et seq.*; *see Zuber v. Allen*, 396 U.S. 168, 174-76 (1969); *see generally* Daniel Bensing, "The Promulgation and Implementation of Federal

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[1] Collectively referred to as "the Hornes," the Plaintiffs-Appellants are Marvin and Laura Horne, d/b/a Raisin Valley Farms (a California general partnership), and d/b/a Raisin Valley Farms Marketing Association (a California unincorporated association), together with their business partners Don Durbahn and the Estate of Rena Durbahn, collectively d/b/a Lassen Vineyards (a California general partnership).

Marketing Orders Regulating Fruit and Vegetable Crops Under the Agricultural Marketing Agreement Act of 1937," 5 *San Joaquin Agric. L. Rev.* 3 (1995). The declared purposes of the AMAA are, inter alia, to help farmers achieve and maintain price parity for their agricultural goods and to protect producers and consumers alike from "unreasonable fluctuations in supplies and prices" by establishing orderly marketing conditions. 7 U.S.C. § 602; *see Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 138 (1963); *Pescosolido v. Block*, 765 F.2d 827, 830 (9th Cir. 1985).

To achieve these goals, the AMAA delegates authority to the Secretary of Agriculture ("Secretary") to issue marketing orders[2] regulating the sale and delivery of agricultural goods, 7 U.S.C. § 608c, principally by imposing production quotas or by restricting the supply of a commodity for sale on the open market, either through marketing

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[2] According to the specific promulgation procedures mandated by the AMAA, the Secretary may only issue a marketing order if, after providing notice and opportunity for hearing, he finds that "the issuance of such order . will tend to effectuate the declared policy" of the Act. 7 U.S.C. § 608c(3)-(4). Such order will not become effective until approved by both (1) the handlers of at least 50 percent of the volume of the commodity covered by the proposed order and (2) either (a) two-thirds of producers of that commodity during a representative period or (b) producers of two- thirds of the volume of that commodity during said period. *Id.* § 608c(8); *see id.* § 608b. The Secretary may terminate or suspend any marketing order upon finding it "obstructs or does not tend to effectuate the declared policy" of the Act, or upon request of a majority of active producers during a representative time period. *Id.* § 608c(16).

allotments or reserve pools, *see id.* § 608c(6).[3] The Secretary, in turn, is authorized to delegate to industry committees the power to administer marketing orders. 7 U.S.C. § 608c(7)(C); *see* 7 C.F.R. § 989.35 (2006). Marketing orders under the AMAA apply only to "handlers," i.e., those who process and pack agricultural goods for distribution,[4] and do not apply to any producer "in his capacity as a producer."[5] 7 U.S.C. §§ 608c(1), 608c(13)(B).[6] Any

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[3] Section 8c of the AMAA, 7 U.S.C. § 608c, the key statutory provision dealing with the marketing orders, originated in a 1935 amendment to the Agricultural Adjustment Act of 1933, Pub. L. No. 73-10, 48 Stat. 31 ("AAA"). The Supreme Court invalidated parts of the AAA in 1936, *see United States v. Butler*, 297 U.S. 1, 77 (1936), but Congress quickly reenacted most of the AAA's production-control measures in the AMAA, which the Supreme Court subsequently upheld against various constitutional challenges, *see United States v. Rock Royal Co-op, Inc.*, 307 U.S. 533 (1939).

[4] A "handler" under the Raisin Marketing Order is

> (a) [a]ny processor or packer; (b) any person who places, ships, or continues natural raisins in the current of commerce from within [California] to any point outside thereof; (c) any person who delivers off-grade raisins, other failing raisins or raisin residual material to other than a packer or other than into any eligible non-normal outlet; or (d) any person who blends raisins [subject to certain exceptions].

7 C.F.R. § 989.15. A "packer," in turn, is "any person who, within [California], stems, sorts, cleans, or seeds raisins, grades stemmed raisins, or packages raisins for market as raisins," but does not include a producer who sorts and cleans his own raisins in their unstemmed form. *Id.* § 989.14.

[5] A "producer" under the Raisin Marketing Order is "any person engaged in a proprietary capacity in the production of

handler who fails to comply with the terms of a marketing order is subject to civil forfeiture, as well as possible civil and criminal penalties. 7 U.S.C. §§ 608a(5), 608a(6), 608c(14) (authorizing civil penalties up to $1,000 for each violation, with each day constituting a separate violation).

The Raisin Marketing Order was originally enacted in 1949, *see* 14 Fed. Reg. 5136 (Aug. 18, 1949) (codified, as amended, at 7 C.F.R. Part 989), in an effort to stabilize raisin prices by controlling production surpluses, which since 1920 had consistently been thirty to fifty percent of each year's crop. *See* Parker, 317 U.S. at 363-64.[7] Like many

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grapes which are sun-dried or dehydrated by artificial means until they become raisins." 7 C.F.R. § 989.11.

[6] The regulation of handlers, as opposed to growers, appears to be a vestige of the historical context in which the AMAA was enacted, "an era when small, independent growers were frequently left to the mercy of large handlers who could benefit from their market power and position." Bensing, *supra*, at 8. In the raisin industry, producers generally own the land on which the grapevines are located, and they typically pick the grapes and dry them on trays before selling the unstemmed raisins to packers, or "handlers." Packers then prepare the raisins for commercial sale and distribution by cleaning, stemming, seeding, grading, sorting, and packaging the raisins into containers. Packers then typically sell the packed raisins to wholesalers, distributors, and other dealers for resale and distribution to the public. *Brown v. Parker*, 39 F. Supp. 895, 896-97 (S.D. Cal. 1941), *rev'd on other grounds by Parker v. Brown*, 317 U.S. 341 (1943).

[7] The raisin industry has long been an important one in California, where 99.5 percent of the U.S. crop and 40 percent of the world's crop are produced. *See* The California Raisin Industry, http://www.calraisins.org/ about/the-raisin-industry/ (last visited July 6, 2011). Raisin prices rose rapidly between

other fruit and vegetable orders issued under the AMAA,[8] the Order provides for the establishment of annual reserve pools, as determined by each year's crop yield, thereby removing surplus raisins from sale on the open domestic market and indirectly controlling prices. *See* 7 U.S.C. § 608c(6)(E); 7 C.F.R. §§ 989.54(d), 989.65. By February 15 of each year, the Raisin Administrative Committee ("RAC")—an industry committee charged with administration of the Raisin Marketing Order,[9] *see* 7 C.F.R. §§ 989.35, 989.36—recommends the "reserve-

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1914 and 1920, peaking in 1921 at $235 per ton. This price increase spurred increased production, which in turn caused prices to plummet back down to between $40 and $60 per ton, even while production continued to expand. As a result of this growing disparity between increasing production and decreasing prices, the industry became "compelled to sell at less than parity prices and in some years at prices regarded by students of the industry as less than the cost of production," finally prompting federal government intervention with the Raisin Marketing Order in 1949. *See Parker*, 317 U.S. at 363-64 & nn.9-10.

[8] For a comparison of the Raisin Marketing Order and marketing orders for other agricultural products, such as walnuts, almonds, prunes, tart cherries, and spearmint, see *Evans v. United States*, 74 Fed. Cl. 554, 558 (2006), *aff'd*, 250 Fed. Appx. 321 (Fed. Cir. 2007).

[9] The RAC is currently comprised of forty-seven industry-nominated representatives appointed by the Secretary, of whom thirty-five represent producers, ten represent handlers, one represents the cooperative bargaining association, and one represents the public. *See* 7 C.F.R. §§ 989.26, 989.29, 989.30. The RAC is an agent of the federal government but receives no federal appropriations. Instead, it is funded by assessments levied on handlers per ton of raisins sold on the open market and by proceeds from the sale of reserve-tonnage raisins. *See* 7 C.F.R. §§ 989.53, 989.79, 989.80(a), 989.82.

tonnage" and "free-tonnage" percentages for that year, which the Secretary then promulgates. *See id.* §§ 989.54(d), 989.55. The reserve-tonnage requirement varies from year to year; for example, in the 2002-03 and 2003-04 crop years at issue here, the reserve percentages were set at forty-seven percent and thirty percent of a producer's crop, respectively.

As a result of the Order's reserve program requirements, a producer receives payment (at a pre-negotiated field market price) upon delivery of raisins to a handler only for the free- tonnage raisins, which the handler is then free to sell on the domestic market without restrictions. *See id.* § 989.65. The reserve-tonnage raisins, on the other hand, must be held by the handler in segregated bins "for the account" of the RAC until the RAC sells them to handlers for resale in export markets or directs that they be sold or disposed of in secondary, non-competitive markets, such as school lunch programs, either by direct sale or gift to U.S. agencies or foreign governments. *Id.* §§ 989.54, 989.56, 989.65, 989.67, 989.166, 989.167. The reserve pool sales are used to finance the RAC's administration, and any remaining net proceeds must then be equitably distributed to the producers on a pro rata basis. *See* 7 U.S.C. § 608c(6)(E) (providing for "the equitable distribution of the net return derived from the sale [of reserve-pool raisins] among the persons beneficially interested therein"); 7 C.F.R. § 989.66(h). Thus, although producers do not receive payment for reserve-tonnage raisins at the time of delivery to a handler, they retain a limited equity interest in the net proceeds of the RAC's disposition of the reserve, to be paid at a later time.

The RAC is tasked with selling the reserve raisins in a manner "intended to maxim[ize] producer returns and achieve maximum disposition of such raisins by the time reserve tonnage raisins from the subsequent crop year are available," 7 C.F.R. § 989.67(d)(1), but the Hornes complain that they have not received any reserve sale proceeds since the mid-1990s. For example the RAC designated forty-seven percent of the 2002-03 crop as reserve tonnage, which it then sold for $970 per ton, but none of the money the RAC received was paid back to the raisin producers.

In addition to the reserve pool requirement, the Raisin Marketing Order obliges handlers to, *inter alia*: file reports with the RAC, pay assessments to the RAC, and grant the RAC access to records for auditing purposes. *See id.* §§ 989.58, 989.59, 989.73, 989.77, 989.80.

II. The Hornes' Raisin Enterprises

Marvin and Laura Horne have been producing raisins in Fresno and Madera Counties in California since 1969 and in 1999 registered as a California general partnership under the name Raisin Valley Farms. They also own and operate Lassen Vineyards, another registered California general partnership, in partnership with Laura's parents, Don and Rena Durbahn. Disillusioned with a regulatory scheme they deemed "outdated" and exploitive of farmers, the Hornes looked for ways to avoid the Raisin Marketing Order's requirements, particularly its mandatory raisin reserve program. Because those requirements apply only to handlers, the Hornes implemented a plan to bring their raisins to market without going through a traditional

middle-man packer. As part of their plan, the Hornes purchased their own equipment and facilities to clean, stem, sort, and package raisins, which they installed on Lassen Vineyards property in 2001. Not only did this facility handle the raisins from Raisin Valley Farms and Lassen Vineyards, it also contracted with more than sixty other raisin growers to clean, stem, sort, and in some cases box and stack their raisins for a per-pound fee, typically twelve cents per pound.[10] USDA records reflect that Lassen Vineyards packed out more than 1.2 million pounds of raisins during the 2002-03 crop year and more than 1.9 million pounds during the 2003-04 crop year.

Meanwhile, the Hornes also organized these sixty-some growers into the Raisin Valley Marketing Association, an unincorporated association that marketed and sold raisins to wholesale customers on its members' behalf, while the growers maintained ownership over their own raisins. Raisin Valley Marketing then held the sales funds on the growers' behalf in a trust account, from which it paid Lassen Vineyards its packing fees, paid a third-party broker fee, and distributed the net proceeds to the growers.

III. Proceedings Below

The Administrator of the Agricultural Marketing Service initiated an enforcement action against the Hornes, alleging violations of the AMAA and failure to comply with the Raisin Marketing Order's various requirements. On appeal from an Administrative

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[10] This type of arrangement is known as "toll packing." Toll packers do not acquire ownership of the commodity but instead provide a packing service for a fee.

Law Judge's decision following an on-the- record hearing, the USDA JO found both Raisin Valley Farms and Lassen Vineyards liable for: (1) twenty violations of 7 C.F.R. § 989.73 (filing of inaccurate reports); (2) fifty-eight violations of 7 C.F.R. § 989.58(d) (failing to obtain incoming inspections); (3) 592 violations of 7 C.F.R. § 989.66 and 7 C.F.R. § 989.166 (failing to hold reserve raisins for the 2002-03 and 2003-04 crop years); (4) two violations of 7 C.F.R. § 989.80 (failing to pay assessments to the RAC); and (5) one violation of 7 C.F.R. § 989.77 (failing to allow the Agricultural Marketing Service access to records). The JO accordingly ordered the Hornes to pay (1) $8,783.39 in unpaid assessments for the 2002-03 and 2003-04 crop years, pursuant to 7 C.F.R. § 989.80(a); (2) $483,843.53, the alleged dollar equivalent of the withheld raisin reserve contributions for the 2002-03 (632,427 pounds) and 2003-04 (611,159 pounds[11]) crop years, pursuant to 7 C.F.R. § 989.166(c); and (3) $202,600 in civil penalties, pursuant to 7 U.S.C. § 608c(14)(B).

The Hornes filed this action in district court seeking judicial review of a final agency decision pursuant to 7 U.S.C. § 608c(14)(B).[12] On cross-

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[11] The Hornes do not challenge the JO's calculation of these figures.

[12] In a separate action not the subject of this appeal, the Hornes filed an administrative petition before the Secretary of Agriculture in March 2007 pursuant to 7 U.S.C. § 608c(15)(A) challenging the Raisin Marketing Order and its application to them. The JO granted the USDA's motion to dismiss for lack of standing. The Hornes filed a complaint in district court, but the district court dismissed it for lack of subject matter jurisdiction because it was not timely filed, and we affirmed. *See Horne v.*

motions for summary judgment, the district court granted summary judgment for the USDA, and the Hornes timely appealed.

STANDARDS OF REVIEW

A district court's grant of summary judgment is reviewed de novo. *Ariz. Life Coal., Inc. v. Stanton*, 515 F.3d 956, 962 (9th Cir. 2008). Viewing the evidence in the light most favorable to the non-moving party, we must determine whether any genuine issues of material fact remain and whether the district court correctly applied the relevant substantive law. *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc). We review de novo a constitutional challenge to a federal regulation. *Doe v. Rumsfeld*, 435 F.3d 980, 984 (9th Cir. 2006) (citing *Gonzales v. Metro. Transp. Auth.*, 174 F.3d 1016, 1018 (9th Cir. 1999)). We also review de novo whether a fine is unconstitutionally excessive. *United States v. Mackby*, 339 F.3d 1013, 1016 (9th Cir. 2003) (*citing United States v. Bajakajian*, 524 U.S. 321, 337 n.10 (1998)).

DISCUSSION

I. Application of the Raisin Marketing Order to the Hornes

For the reasons discussed in the district court's opinion below, we conclude that the Hornes, who admit that their toll- packing business "stems, sorts, cleans," and "packages raisins for market as raisins," 7 C.F.R. § 989.14, satisfy the regulatory definition of a "packer" and are thus "handlers" subject to the

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U.S. Dep't of Agric., 395 Fed. Appx. 486 (9th Cir. Sep. 27, 2010) (unpublished).

Raisin Marketing Order's provisions, *see* 7 C.F.R. § 989.15. *See Horne v. U.S. Dep't of Agric.*, 2009 U.S. Dist. LEXIS 115464, at *20-49 (E.D. Cal. Dec. 11, 2009). The USDA's interpretation of its own regulation is not "plainly erroneous or inconsistent with the regulation" and thus must be given "controlling weight." *See Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *accord Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Miller v. Cal. Speedway Corp.*, 536 F.3d 1020, 1028 (9th Cir. 2008). Furthermore, its findings regarding the Hornes' handler operations are supported by substantial evidence and are neither arbitrary nor capricious. *See* 5 U.S.C. § 706(2)(A), (E).

The Hornes argue they are statutorily exempt from regulation because they also satisfy the regulatory definition of a "producer," and the AMAA provides that "[n]o order issued under this chapter shall be applicable to any producer in his capacity as a producer." 7 U.S.C. § 608c(13)(B). However, by expressly limiting the exemption from regulation only to a producer "in his capacity as a producer," the AMAA contemplates that an individual who performs both producer and handler functions may still be regulated in his capacity as a handler. Even if the AMAA is considered "silent or ambiguous" on the regulation of individuals who perform both producer and handler functions, we must give *Chevron* deference to the permissible interpretation of the Secretary of Agriculture, who is charged with administering the statute. *Chevron, USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *see* 7 U.S.C. § 608c(1); *see also Morales-Izquierdo v. Dep't of Homeland Sec.*, 600 F.3d 1076, 1086-87 (9th Cir. 2010); *Midway Farms v. U.S. Dep't*

of Agric., 188 F.3d 1136, 1140 n.5 (9th Cir. 1999). Other courts have similarly rejected the Hornes' argument that a producer who handles his own product for market is statutorily exempt from regulation under the AMAA. *See*, e.g., *Freeman v. Vance*, 319 F.2d 841, 842 (5th Cir. 1963) (per curiam); *Ideal Farms, Inc. v. Benson*, 288 F.2d 608, 614 (3d Cir. 1961), *cert. denied*, 372 U.S. 965 (1963); *Evans*, 74 Fed. Cl. at 557-58. Deferring to the agency's permissible interpretation of the statute, as we must, we conclude that applying the Raisin Marketing Order to the Hornes in their capacity as handlers was not contrary to the AMAA.

II. Takings Claim

Does the Raisin Marketing Order's reserve requirement program constitute a physical, per se taking of the Hornes' personal property without just compensation, in violation of the Fifth Amendment? *See* U.S. Const. amend. V ("[N]or shall private property be taken for public use, without just compensation."). We join the Court of Federal Claims, which not long ago decided this exact question, in holding it does not. *See Evans*, 74 Fed. Cl. at 562-64; *cf. Cal-Almond, Inc. v. United States*, 30 Fed. Cl. 244, 246-47 (1994) (rejecting a takings claim against a similar reserve program under the almond marketing order).

The Fifth Amendment Takings Clause does not itself authorize the taking of private property, nor does it prohibit the government from doing so. Instead, it imposes conditions on the government's authority to act, providing that *when* government takes private property, pursuant to the lawful exercise of its constitutional powers, (1) it must take

for public rather than private use, and (2) it must provide owners with just compensation, as measured by the property owner's loss. *See Brown v. Legal Found. of Wash.*, 538 U.S. 216, 231-32, 235-36 (2003); *First English Evangelical Lutheran Church of Glendale v. Cnty. of L.A.*, 482 U.S. 304, 314 (1987). The former condition ensures that government does not abuse its powers by taking private property for another's private gain, *see, e.g., Penn. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922); the latter ensures that even when government acts in the public interest, it does not "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

In its earliest days, the Takings Clause was thought to apply only to "direct appropriation of property, or the functional equivalent of a practical ouster of the owner's possession," *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005) (internal quotation marks and brackets omitted), *i.e.*, "physical takings." *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028 n.15 (1992). Over the years, its reach has extended to accommodate the modern reality that "government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster." *Lingle*, 544 U.S. at 537; *see also Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427-38 (1982) (surveying evolution of the takings doctrine). Most takings challenges to governmental regulations must undergo an ad hoc, fact-intensive inquiry focusing on (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation interferes with reasonable

investment-backed expectations; and (3) the character of the governmental action. *Penn Cent. Transp. Co. v. N.Y.C.*, 438 U.S. 104, 124 (1978). Only in two situations does the Supreme Court recognize that regulatory action *per se* "goes too far" in frustrating property rights, *Mahon*, 260 U.S. at 415: first, "where government requires an owner to suffer a permanent physical invasion of her property[,] however minor," *Lingle*, 544 U.S. at 538; *see, e.g.*, *Loretto*, 458 U.S. at 438 (compensation required where state law forced landlords to permit cable companies to install cable facilities occupying one and one-half square feet of rooftops); *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) (same for imposition of navigational servitude upon private marina); *United States v. Causby*, 328 U.S. 256, 265 & n.10 (1946) (same for physical invasions of airspace); and second, where government regulation "denies all economically beneficial or productive use of land," *Lucas*, 505 U.S. at 1015 (emphasis added) (compensation required where state law barring construction of any permanent habitable structures on beachfront property rendered land parcels "valueless"). When government action results in such a "total regulatory taking[ ]," *id.* at 1026, as opposed to a mere "partial regulatory taking[ ]," *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 326 (2002), a property owner is categorically entitled to compensation, without resort to the usual case-specific inquiry.

The Hornes, however, do not claim that the Raisin Marketing Order effects a regulatory taking, partial or total. Instead, they insist we need look no further than the RAC's annual "direct appropriation" of their reserve-tonnage raisins to conclude this is a classic

physical taking. Though the simplicity of their logic has some understandable appeal—their raisins are personal property, personal property is protected by the Fifth Amendment, and each year the RAC "takes" some of their raisins, at least in the colloquial sense—their argument rests on a fundamental misunderstanding of the nature of property rights and instead clings to a phrase divorced from context.

It is undisputed that the Fifth Amendment guarantees compensation for the taking not only of real property but also of personal property and even intangible property. *See Phillips v. Wash. Legal Found.*, 524 U.S. 156, 172 (1998) (interest earned on lawyers' trust account is a protected private property); *Brown*, 538 U.S. at 235 (same); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001-04 (1984) (same for trade secrets). No one suggests the government could come onto the Hornes' farm uninvited and walk off with forty-seven percent of their crops without offering just compensation, even if the seizure itself were justified (for example, as a wartime measure). *See Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987); *United States v. Pewee Coal Co.*, 341 U.S. 114, 115-17 (1951) (government's wartime seizure and operation of a coal mine to prevent a national coal miners' strike constituted a compensable taking). Certainly, that government action is authorized does not immunize it from a takings claim; indeed, the Takings Clause *presupposes* that the government has taken lawfully. *Lingle*, 544 U.S. at 543; *see Kaiser Aetna*, 444 U.S. at 172 (no "blanket exception" to the Takings Clause simply because Congress has acted under lawful authority). If the Raisin Marketing Order

authorized an uninvited, forcible taking of the Hornes' crops, there is no question that the government would have "a categorical duty to compensate the [Hornes], regardless of whether the interest that is taken constitutes an entire parcel [i.e., all their crops,] or merely a part thereof." *Tahoe-Sierra*, 535 U.S. at 322 (internal citation omitted).

But a forcible taking is not what the Raisin Marketing Order accomplishes. Far from compelling a physical taking of the Hornes' tangible property, the Raisin Marketing Order applies to the Hornes only insofar as they voluntarily choose to send their raisins into the stream of interstate commerce. Simply put, it is a use restriction, not a direct appropriation. The Secretary of Agriculture did not authorize a forced seizure of forty-seven percent of the Hornes' 2002-03 crops and thirty percent of their 2003-04 crops, but rather imposed a condition on the Hornes' *use* of their crops by regulating their sale. As we explained in a similar context over seventy years ago, the Raisin Marketing Order "contains no absolute requirement of the delivery of [reserve-tonnage raisins] to the [RAC]" but rather only "a conditional one." *Wallace v. Hudson-Duncan & Co.*, 98 F.2d 985, 989 (9th Cir. 1938) (rejecting a takings challenge to a reserve requirement under the walnut marketing order).

In rejecting a claim that a local mobile home rent control ordinance amounted to a physical taking of park owners' property interest, the Supreme Court similarly explained that "[t]he government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land." *Yee v. City of Escondido*, 503 U.S. 519, 527 (1992)

(emphasis in original). Emphasizing that the "'element of required acquiescence is at the heart of the concept of occupation,'" *id.* (*quoting FCC v. Fla. Power Corp.*, 480 U.S. 245, 252 (1987)), the Court explained that the mobile park owners had no physical takings claim because they voluntarily rented their land to mobile home owners and thus acquiesced in the regulation not under government compulsion but of their own accord, *id.* at 527-28. This same logic was used to defeat a takings challenge to a statute authorizing the public disclosure of private data submitted by applicants as a condition on registering their pesticides. *See Ruckelshaus*, 467 U.S. at 1007. Even though the applicants had a recognized interest in their intellectual property, the Supreme Court reasoned that "a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking," so long as the disclosure condition was rationally related to a legitimate government interest and the applicant was made aware of the condition in advance. *Id.*

There are, of course, limits to what conditions the government can constitutionally impose. The government "may not require a person to give up a constitutional right—[for example,] the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property." *Dolan*, 512 U.S. at 385. Thus, where the government conditioned the grant of a coastal development permit on the granting of a public easement bearing no nexus to the original purpose of the building restriction, the Supreme Court held that the

government could not avoid paying compensation simply by shoehorning a taking into an unrelated exercise of its police powers. *Nollan*, 483 U.S. at 837; *see also Dolan*, 512 U.S. at 395 (holding that city could not require development permit applicant to grant a public pathway easement where there was no reasonable relationship between the proposed development and the condition imposed). Here, however, the condition imposed is rationally related to the government's legitimate interest in controlling the supply of raisins on the domestic market so as to prevent price destabilization and corollary effects on the economy, and the Hornes had ample prior notice of the condition before they voluntarily decided to enter the raisin market.

Nevertheless, the Hornes insist their so-called "voluntary" subjection to the Raisin Marketing Order is in fact the product of a Hobson's choice, for they have no economically viable alternative to selling their raisins and therefore must suffer the complete and total taking of a designated percentage of their raisins under compulsion. Their argument is founded on an erroneous belief that they have a property right to "market their [raisins] free of regulatory controls," *Cal-Almond*, 30 Fed. Cl. at 246, and is unavailing.

Admittedly, the Raisin Marketing Order's expansive definition of "handler," which includes anyone who "packs" raisins for sale even if the raisins are sold exclusively within the state of California, renders its regulatory reach less escapable than the marketing order at issue in *Wallace*, which did not apply to walnuts sold within the state of production. *See Wallace*, 98 F.2d at 989.

Nonetheless, we noted in *Wallace* a "distinction between the direct appropriation of property and the destruction of property values in the exercise of governmental power," *id.*, observing that the regulation would remain valid "[e]ven if the [c]ompany were able to show . . . that the only alternative to making delivery to the [government] of surplus walnuts or their 'credit value' would be to go out of business," *id.* at 990.

This seemingly draconian result flows from the long- standing notion that "some [property] values are enjoyed under an implied limitation and must yield" to the government's regulatory powers. *Mahon*, 260 U.S. at 413. The implied restrictions on our property rights "are the burdens we all must bear in exchange for the advantage of living and doing business in a civilized community," *Ruckelshaus*, 467 U.S. at 1007 (internal quotation marks and citations omitted). Our takings jurisprudence is "guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property," *Lucas*, 505 U.S. at 1027, and not every restriction on our use of property amounts to a compensable taking.

Although the Fifth Amendment, as previously discussed, protects real and personal property alike, the personal property—"bundle of rights" is not coextensive with the bundle comprising real property, as they are informed by different background principles. *See id.* at 1027-30. Consequently, the same government action may effect a taking when applied to one type of property but not the other. Whereas a regulation depriving a

landowner of "*all* economically beneficial uses" of his land effects a categorical taking, *see Lucas*, 505 U.S. at 1019 (emphasis in original), the same may not necessarily be true of a regulation banning the sale of a commercial product, *see, e.g., Andrus v. Allard*, 444 U.S. 51, 66-67 (1979) (holding that prohibition on sale of eagle feathers was not a taking); *Ruppert v. Caffey*, 251 U.S. 264 (1920) (upholding sales ban on nonintoxicating alcoholic beverages against takings challenge); *James Everard's Breweries v. Day*, 265 U.S. 545 (1924) (upholding ban on sale of all liquor, including liquor lawfully manufactured before passage of the statute). While the total deprivation of beneficial use of land carries a "heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm," *Lucas*, 505 U.S. at 1018, when it comes to personal property, "the State's traditionally high degree of control over commercial dealings" ought to put a property owner on notice "of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale)," *id.* at 1027-28. Thus, although the right to sell their raisins is a significant one, it is but one "strand" in the Hornes' bundle, and even the destruction of that single strand would not amount to a taking without undergoing Penn Central ad hoc review. *See Andrus*, 444 U.S. at 65-66 ("significant restriction . . . imposed on one means of disposing of the artifacts" does not amount to a taking); *see also Rock Royal*, 307 U.S. at 572 ("As the Congress would have, clearly, the right to permit only limited amounts of milk to move in interstate

commerce, . . . it might permit the movement on terms of pool settlement . . . ").

In any event, the Raisin Marketing Order does *not* destroy that strand and does *not* deny raisin farmers all economically beneficial use of their raisins, for the regulation does not ban the sale of raisins altogether but only requires the delivery to the RAC of a certain percentage of raisins prepared for market. The Hornes insist the regulation effects a total taking of those reserve-tonnage raisins, but they ignore the Supreme Court's repeated admonition that we must consider the regulation's impact on "the parcel as a whole" rather than "divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Penn Cent.*, 438 U.S. at 130-131 & n.27; *accord Tahoe-Sierra*, 535 U.S. at 327. For example, where a statute required coal companies to leave unmined fifty percent of their coal beneath certain structures to prevent land subsidence, the Supreme Court found no taking, reasoning that "[t]he 27 million tons of coal do not constitute a separate segment of property for takings law purposes." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 498 (1987).

Accordingly, the Hornes' argument that they have suffered a complete and total taking of their reserve-tonnage raisins is squarely foreclosed by case law, for the relevant parcel here is the entirety of their annual crop, not the individual raisins destined for the reserve pool. Even if in absolute terms they number in the billions, the reserve-tonnage raisins are but a designated percentage of a producer's total annual crop handled for sale in the domestic market.

Furthermore, the Hornes have put forth no evidence that the Raisin Marketing Order "makes it impossible for [them] to profitably engage in their business." *Id.* at 485. We imagine it would be difficult for the Hornes to gather such evidence, given that the reserve-pool restrictions on the market supply of raisins serve to *raise* prices for the Hornes' free-tonnage raisins, ostensibly making their business *more* profitable than it would be in an unregulated free market.

The Hornes have suffered no compensable *physical* taking of any portion of their crops, and thus the Fifth Amendment poses no obstacle to the Secretary's enforcement of the Raisin Marketing Order against them. Because the Hornes do not advance the alternative theory that the Raisin Marketing Order effects a regulatory taking, we leave that question for another day.

III. Excessive Fines Claim

Finally, in connection with their takings argument, the Hornes protest the JO's imposition of nearly $700,000 in combined assessments and fines, which they believe excessively penalizes them, in violation of the Eighth Amendment, for their justified refusal to deliver their own private property into the hands of the government. *See* U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

To prevail on an excessive fines claim, a plaintiff must establish (1) the assessment is imposed, at least in part, for punitive and not merely remedial purposes, and (2) the fine is excessive, or "grossly

disproportional to the gravity of [the] offense" for which it is imposed. *Bajakajian*, 524 U.S. at 334; *see Engquist v. Or. Dep't of Agric.*, 478 F.3d 985, 1006 (9th Cir. 2007); *Mackby*, 339 F.3d at 1016. Although an excessive punitive civil fine is not beyond the Eighth Amendment's reach, *Hudson v. United States*, 522 U.S. 93, 103 (1997), civil forfeiture that merely "provides a reasonable form of liquidated damages" as compensation for government losses resulting from the unlawful activity is remedial, not punitive, and accordingly does not implicate the Eighth Amendment, *One Lot Emerald Cut Stones & One Ring v. United States*, 409 U.S. 232, 237 (1972); *see United States v. $273,969.04 U.S. Currency*, 164 F.3d 462, 466 (9th Cir. 1999); *Austin v. United States*, 509 U.S. 602, 622 n.14 (1993) ("[A] fine that serves purely remedial purposes cannot be considered 'excessive' in any event.").

Here, the district court correctly determined that the $8,783.39 in unpaid assessments imposed pursuant to 7 C.F.R. § 989.80(a) and the $483,843.53 in compensation for the withheld reserve-tonnage raisins imposed pursuant to 7 C.F.R. § 989.166(c) amounted to remedial rather than punitive forfeitures and that the Excessive Fines Clause therefore is inapplicable to those penalties. The JO's order that the Hornes pay assessments to the RAC was calculated solely to compensate the RAC for the mandatory assessments not paid. *See* 7 C.F.R. § 989.80(a) ("Each handler shall, with respect to free tonnage acquired by him . pay to the committee, upon demand, his pro rata share of the expenses . which the Secretary finds will be incurred, as aforesaid, by the committee during each crop year . ."). Similarly, the JO's order that the Hornes

compensate the RAC for the withheld reserve-tonnage raisins flowed inexorably from another remedial, non-punitive provision of the regulations. *See id.* § 989.166(c) ("A handler who fails to deliver to the Committee, upon request, any reserve tonnage raisins in the quantity and quality for which he has become obligated . shall compensate the Committee for the amount of the loss resulting from his failure to so deliver," as determined by a fixed formula.). Calculation of the compensation amount is nondiscretionary and is limited by the extent of the government's loss. *Cf.* $273,969.04, 164 F.3d at 466 (inferring punitive nature of a sanction where it was not limited by the extent of the government's loss and was tied to commission of a crime). The JO's use of the "field price" to calculate the compensatory amount the Hornes owed the RAC for their withheld reserve-tonnage raisins was consistent with the regulations. *See* 7 C.F.R. § 989.166(c).

The only sanction that implicates the Excessive Fines Clause is the $202,600 fine imposed pursuant to 7 U.S.C. § 608c(14)(B), but we again agree with the district court that this civil penalty, less than one-third the authorized statutory amount, is not "grossly disproportional to the gravity of [the Hornes'] offense." *Bajakajian*, 524 U.S. at 334. Although we have no set formula for determining the proportionality of a given penalty, relevant factors include the severity of the offense, the statutory maximum penalty available, and the harm caused by the offense. *Mackby*, 339 F.3d at 1016; *see also United States v. 3814 NW Thurman St.*, 164 F.3d 1191, 1197-98 (9th Cir. 1999).

We have previously recognized that noncompliance with a marketing order's reporting and reserve requirements are serious offenses that threaten the Secretary's ability to regulate a given market and prevent price destabilization, while also unjustly enriching the offenders who profit from selling their reserve-tonnage goods on the open market. *See Balice v. U.S. Dep't of Agric.*, 203 F.3d 684, 693, 695, 698-99 (9th Cir. 2000) (upholding a fine of $225,500 imposed on an almond handler subject to up to $528,000 in fines for violations of various reporting and reserve requirements). Furthermore, that Congress authorized a much steeper fine ($1,000 for each of the Hornes' 673 separate offenses spanning a two-year period, for a total of $673,000) than what the JO actually imposed, while not dispositive, weighs heavily against finding the fine grossly disproportional to the Hornes' offense, for "judgments about the appropriate punishment for an offense belong in the first instance to the legislature." *Bajakajian*, 524 U.S. at 336, 339 n.14; *accord Balice*, 203 F.3d at 699.[13] In light of these factors, we cannot say the district court erred in

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[13] Although in *Balice* it appears the JO imposed penalties under only 7 U.S.C. § 608c(14) and not under the regulation's forfeiture provisions, whereas here the JO imposed both, nothing in the statutory or regulatory language seems to preclude simultaneous imposition of remedial and punitive sanctions under the respective provisions. To the contrary, 7 C.F.R. § 989.166(c) expressly provides that compensation for failure to deliver reserve-tonnage raisins "shall be in addition to, and not exclusive of, any or all of the remedies or penalties prescribed in the act" for noncompliance with the act or regulation's requirements, and the Hornes do not challenge the legitimacy of this provision.

finding the penalties consistent with the Eighth Amendment.[14]

CONCLUSION

The Hornes are clearly dissatisfied and frustrated with a regulatory scheme they believe no longer serves the interests of the farmers it was designed, in large part, to protect. That being the case, the Hornes may wish to "take their case to the Secretary for a reevaluation of the [Raisin Marketing] Order and the regulations, for although the [Raisin Marketing] Order and the regulations are lawful, plaintiffs and other producers may prevail upon the Secretary to change them in order to better achieve the purpose behind the [AMAA]." *Prune Bargaining Ass'n v. Butz*, 444 F. Supp. 785, 793 (N.D. Cal. 1975), *aff'd sub nom. Prune Bargaining Ass'n v. Bergland*, 571 F.2d 1132 (9th Cir. 1978) (per curiam); *see* 7 U.S.C. § 608c(16) (prescribing mechanism for termination or suspension of marketing orders). Our

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[14] We also reject the Hornes' contention that 7 U.S.C. § 608c(14)(B) exempts them from liability for their Raisin Marketing Order violations because in 2007 they filed an administrative petition pursuant to 7 U.S.C. § 608c(15)(A). *See* 7 U.S.C. § 608c(14)(B) (immunizing from civil penalty any handler who "in good faith and not for delay" files and prosecutes a qualifying administrative petition). First, this argument was already disposed of in one of our earlier decisions, *see Horne*, 397 Fed. Appx. at 486, and is not properly before us now. Moreover, even if the matter were properly before us, it is without merit. Section 608c(14)(B) only immunizes handlers from penalties otherwise incurred during the pendency of their administrative petition; it does not apply retroactively. Therefore, an administrative petition not filed until 2007 cannot immunize the Hornes from fines relating to their conduct in 2002-04.

role, however, is limited to reviewing the constitutionality and not the wisdom of the current regulation. Finding no constitutional infirmity in either the Raisin Marketing Order or the Secretary's application of it to the Hornes, the summary judgment of the district court is **AFFIRMED**.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARVIN D. HORNE and LAURA R. HORNE, d.b.a. RAISIN VALLEY FARMS, a partnership, and d.b.a. RAISIN VALLEY FARMS MARKETING ASSOCIATION, a.k.a. RAISIN VALLEY MARKETING, an unincorporated association; MARVIN D. HORNE; LAURA R. HORNE; DON DURBAHN, and the ESTATE OF RENA DURBAHN, d.b.a. LASSEN VINEYARDS, a partnership,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant-Appellee.

No. 10-15270
D.C. No. 1:08-cv-01549-LJO-SMS

AMENDED OPINION

Appeal from the United States District Court
for the Eastern District of California
Lawrence J. O'Neill, District Judge, Presiding

Argued and Submitted
April 14, 2011—Pasadena, California

Filed July 25, 2011
Amended March 12, 2012

Before: Stephen Reinhardt, Michael Daly Hawkins, and Ronald M. Gould, Circuit Judges.

Opinion by Judge Hawkins

COUNSEL

Brian C. Leighton, Clovis, California, for the plaintiffs-appellants.

Benjamin B. Wagner, United States Attorney, and Benjamin E. Hall, Assistant United States Attorney, Fresno, California, for the defendant-appellee.

OPINION

HAWKINS, Senior Circuit Judge:

This appeal of a United States Department of Agriculture ("USDA") administrative decision asks us to interpret and pass on the constitutionality of a food product reserve program authorized by the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. § 601 *et seq.* ("AMAA"), and implemented by the Marketing Order Regulating the Handling of Raisins Produced from Grapes Grown in California, 7 C.F.R. Part 989 ("Raisin Marketing Order" or "the Order"), first adopted in 1949. Farmers Marvin and Laura Horne ("the Hornes"[1])

[1] Collectively referred to as "the Hornes," the Plaintiffs-Appellants are Marvin and Laura Horne, d/b/a Raisin Valley

protest the USDA Judicial Officer's ("JO") imposition of civil penalties and assessments for their failure to comply with the reserve requirements, among other regulatory infractions, contending: (1) they are producers not subject to the Raisin Marketing Order's provisions; (2) even if subject to those provisions, the requirement that they contribute a specified percentage of their annual raisin crop to the government-controlled reserve pool constitutes an uncompensated *per se* taking in violation of the Fifth Amendment; and (3) the penalties imposed for their "self-help" noncompliance with the Raisin Marketing Order violate the Eighth Amendment Excessive Fines Clause. We affirm.

BACKGROUND

I. Regulatory Framework

Raisins and other agricultural commodities are heavily regulated under federal marketing orders adopted pursuant to the AMAA, a Depression-era statute enacted in response to plummeting commodity prices, market disequilibrium, and the accompanying threat to the nation's credit system. 7 U.S.C. § 601 *et seq.*; *see Zuber v. Allen*, 396 U.S. 168, 174-76 (1969); *see generally* Daniel Bensing, "The Promulgation and Implementation of Federal Marketing Orders Regulating Fruit and Vegetable Crops Under the Agricultural Marketing Agreement

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Farms (a California general partnership), and d/b/a Raisin Valley Farms Marketing Association (a California unincorporated association), together with their business partners Don Durbahn and the Estate of Rena Durbahn, collectively d/b/a Lassen Vineyards (a California general partnership).

Act of 1937," 5 *San Joaquin Agric. L. Rev.* 3 (1995). The declared purposes of the AMAA are, *inter alia*, to help farmers achieve and maintain price parity for their agricultural goods and to protect producers and consumers alike from "unreasonable fluctuations in supplies and prices" by establishing orderly marketing conditions. 7 U.S.C. § 602; *see Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 138 (1963); *Pescosolido v. Block*, 765 F.2d 827, 830 (9th Cir. 1985).

To achieve these goals, the AMAA delegates authority to the Secretary of Agriculture ("Secretary") to issue marketing orders[2] regulating the sale and delivery of agricultural goods, 7 U.S.C. § 608c, principally by imposing production quotas or by restricting the supply of a commodity for sale on the open market, either through marketing allotments or reserve pools, *see id.* § 608c(6).[3] The

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[2] According to the specific promulgation procedures mandated by the AMAA, the Secretary may only issue a marketing order if, after providing notice and opportunity for hearing, he finds that "the issuance of such order . . . will tend to effectuate the declared policy" of the Act. 7 U.S.C. § 608c(3)-(4). Such order will not become effective until approved by both (1) the handlers of at least 50 percent of the volume of the commodity covered by the proposed order and (2) either (a) two-thirds of producers of that commodity during a representative period or (b) producers of two thirds of the volume of that commodity during said period. *Id.* § 608c(8); *see id.* § 608b. The Secretary may terminate or suspend any marketing order upon finding it "obstructs or does not tend to effectuate the declared policy" of the Act, or upon request of a majority of active producers during a representative time period. *Id.* § 608c(16).

[3] Section 8c of the AMAA, 7 U.S.C. § 608c, the key statutory provision dealing with the marketing orders, originated in a 1935 amendment to the Agricultural Adjustment Act of 1933,

Secretary, in turn, is authorized to delegate to industry committees the power to administer marketing orders. 7 U.S.C. § 608c(7)(C); *see* 7 C.F.R. § 989.35 (2006). Marketing orders under the AMAA apply only to "handlers," i.e., those who process and pack agricultural goods for distribution,[4] and do not apply to any producer "in his capacity as a producer."[5] 7 U.S.C. §§ 608c(1), 608c(13)(B).[6]

Pub. L. No. 73-10, 48 Stat. 31 ("AAA"). The Supreme Court invalidated parts of the AAA in 1936, *see United States v. Butler*, 297 U.S. 1, 77 (1936), but Congress quickly reenacted most of the AAA's production-control measures in the AMAA, which the Supreme Court subsequently upheld against various constitutional challenges, *see United States v. Rock Royal Co-op, Inc.*, 307 U.S. 533 (1939).

[4] A "handler" under the Raisin Marketing Order is

> (a) [a]ny processor or packer; (b) any person who places, ships, or continues natural raisins in the current of commerce from within [California] to any point outside thereof; (c) any person who delivers off-grade raisins, other failing raisins or raisin residual material to other than a packer or other than into any eligible non-normal outlet; or (d) any person who blends raisins [subject to certain exceptions].

7 C.F.R. § 989.15. A "packer," in turn, is "any person who, within [California], stems, sorts, cleans, or seeds raisins, grades stemmed raisins, or packages raisins for market as raisins," but does not include a producer who sorts and cleans his own raisins in their unstemmed form. *Id.* § 989.14.

[5] A "producer" under the Raisin Marketing Order is "any person engaged in a proprietary capacity in the production of grapes which are sun-dried or dehydrated by artificial means until they become raisins." 7 C.F.R. § 989.11.

[6] The regulation of handlers, as opposed to growers, appears to be a vestige of the historical context in which the AMAA was

Any handler who fails to comply with the terms of a marketing order is subject to civil forfeiture, as well as possible civil and criminal penalties. 7 U.S.C. §§ 608a(5), 608a(6), 608c(14) (authorizing civil penalties up to $1,000 for each violation, with each day constituting a separate violation).

The Raisin Marketing Order was originally enacted in 1949, *see* 14 Fed. Reg. 5136 (Aug. 18, 1949) (codified, as amended, at 7 C.F.R. Part 989), in an effort to stabilize raisin prices by controlling production surpluses, which since 1920 had consistently been thirty to fifty percent of each year's crop. *See Parker*, 317 U.S. at 363-64.[7] Like many

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enacted, "an era when small, independent growers were frequently left to the mercy of large handlers who could benefit from their market power and position." Bensing, *supra*, at 8. In the raisin industry, producers generally own the land on which the grapevines are located, and they typically pick the grapes and dry them on trays before selling the unstemmed raisins to packers, or "handlers." Packers then prepare the raisins for commercial sale and distribution by cleaning, stemming, seeding, grading, sorting, and packaging the raisins into containers. Packers then typically sell the packed raisins to wholesalers, distributors, and other dealers for resale and distribution to the public. *Brown v. Parker*, 39 F. Supp. 895, 896-97 (S.D. Cal. 1941), *rev'd on other grounds by Parker v. Brown*, 317 U.S. 341 (1943).

[7] The raisin industry has long been an important one in California, where 99.5 percent of the U.S. crop and 40 percent of the world's crop are produced. *See* The California Raisin Industry, http://www.calraisins.org/about/the-raisin-industry/ (last visited July 6, 2011). Raisin prices rose rapidly between 1914 and 1920, peaking in 1921 at $235 per ton. This price increase spurred increased production, which in turn caused prices to plummet back down to between $40 and $60 per ton, even while production continued to expand. As a result of this growing disparity between increasing production and

other fruit and vegetable orders issued under the AMAA,[8] the Order provides for the establishment of annual reserve pools, as determined by each year's crop yield, thereby removing surplus raisins from sale on the open domestic market and indirectly controlling prices. *See* 7 U.S.C. § 608c(6)(E); 7 C.F.R. §§ 989.54(d), 989.65. By February 15 of each year, the Raisin Administrative Committee ("RAC")—an industry committee charged with administration of the Raisin Marketing Order,[9] *see* 7 C.F.R. §§ 989.35, 989.36—recommends the "reserve tonnage" and "free-tonnage" percentages for that year, which the Secretary then promulgates. *See id.* §§ 989.54(d), 989.55. The reserve-tonnage requirement varies from year to year; for example, in the 2002-03 and 2003-04

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decreasing prices, the industry became "compelled to sell at less than parity prices and in some years at prices regarded by students of the industry as less than the cost of production," finally prompting federal government intervention with the Raisin Marketing Order in 1949. *See Parker*, 317 U.S. at 363-64 & nn.9-10.

[8] For a comparison of the Raisin Marketing Order and marketing orders for other agricultural products, such as walnuts, almonds, prunes, tart cherries, and spearmint, see *Evans v. United States*, 74 Fed. Cl. 554, 558 (2006), *aff'd*, 250 Fed. Appx. 321 (Fed. Cir. 2007).

[9] The RAC is currently comprised of forty-seven industry-nominated representatives appointed by the Secretary, of whom thirty-five represent producers, ten represent handlers, one represents the cooperative bargaining association, and one represents the public. *See* 7 C.F.R. §§ 989.26, 989.29, 989.30. The RAC is an agent of the federal government but receives no federal appropriations. Instead, it is funded by assessments levied on handlers per ton of raisins sold on the open market and by proceeds from the sale of reserve-tonnage raisins. *See* 7 C.F.R. §§ 989.53, 989.79, 989.80(a), 989.82.

crop years at issue here, the reserve percentages were set at forty-seven percent and thirty percent of a producer's crop, respectively.

As a result of the Order's reserve program requirements, a producer receives payment (at a pre-negotiated field market price) upon delivery of raisins to a handler only for the free-tonnage raisins, which the handler is then free to sell on the domestic market without restrictions. *See id.* § 989.65. The reserve-tonnage raisins, on the other hand, must be held by the handler in segregated bins "for the account" of the RAC until the RAC sells them to handlers for resale in export markets or directs that they be sold or disposed of in secondary, non-competitive markets, such as school lunch programs, either by direct sale or gift to U.S. agencies or foreign governments. *Id.* §§ 989.54, 989.56, 989.65, 989.67, 989.166, 989.167. The reserve pool sales are used to finance the RAC's administration, and any remaining net proceeds must then be equitably distributed to the producers on a pro rata basis. *See* 7 U.S.C. § 608c(6)(E) (providing for "the equitable distribution of the net return derived from the sale [of reserve-pool raisins] among the persons beneficially interested therein"); 7 C.F.R. § 989.66(h). Thus, although producers do not receive payment for reserve-tonnage raisins at the time of delivery to a handler, they retain a limited equity interest in the net proceeds of the RAC's disposition of the reserve, to be paid at a later time.

The RAC is tasked with selling the reserve raisins in a manner "intended to maxim[ize] producer returns and achieve maximum disposition of such raisins by the time reserve tonnage raisins from the

subsequent crop year are available," 7 C.F.R. § 989.67(d)(1), but the Hornes complain that they have not received any reserve sale proceeds since the mid-1990s. For example the RAC designated forty-seven percent of the 2002-03 crop as reserve tonnage, which it then sold for $970 per ton, but none of the money the RAC received was paid back to the raisin producers.

In addition to the reserve pool requirement, the Raisin Marketing Order obliges handlers to, *inter alia*: file reports with the RAC, pay assessments to the RAC, and grant the RAC access to records for auditing purposes. *See id.* §§ 989.58, 989.59, 989.73, 989.77, 989.80.

II. The Hornes' Raisin Enterprises

Marvin and Laura Horne have been producing raisins in Fresno and Madera Counties in California since 1969 and in 1999 registered as a California general partnership under the name Raisin Valley Farms. They also own and operate Lassen Vineyards, another registered California general partnership, in partnership with Laura's parents, Don and Rena Durbahn. Disillusioned with a regulatory scheme they deemed "outdated" and exploitive of farmers, the Hornes looked for ways to avoid the Raisin Marketing Order's requirements, particularly its mandatory raisin reserve program. Because those requirements apply only to handlers, the Hornes implemented a plan to bring their raisins to market without going through a traditional middle-man packer. As part of their plan, the Hornes purchased their own equipment and facilities to clean, stem, sort, and package raisins, which they installed on Lassen Vineyards property in 2001. Not

only did this facility handle the raisins from Raisin Valley Farms and Lassen Vineyards, it also contracted with more than sixty other raisin growers to clean, stem, sort, and in some cases box and stack their raisins for a per-pound fee, typically twelve cents per pound.[10] USDA records reflect that Lassen Vineyards packed out more than 1.2 million pounds of raisins during the 2002-03 crop year and more than 1.9 million pounds during the 2003-04 crop year.

Meanwhile, the Hornes also organized these sixty-some growers into the Raisin Valley Marketing Association, an unincorporated association that marketed and sold raisins to wholesale customers on its members' behalf, while the growers maintained ownership over their own raisins. Raisin Valley Marketing then held the sales funds on the growers' behalf in a trust account, from which it paid Lassen Vineyards its packing fees, paid a third-party broker fee, and distributed the net proceeds to the growers.

III. Proceedings Below

The Administrator of the Agricultural Marketing Service initiated an enforcement action against the Hornes, alleging violations of the AMAA and failure to comply with the Raisin Marketing Order's various requirements. On appeal from an Administrative Law Judge's decision following an on-the-record hearing, the USDA JO found both Raisin Valley Farms and Lassen Vineyards liable for: (1) twenty violations of 7 C.F.R. § 989.73 (filing of inaccurate

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[10] This type of arrangement is known as "toll packing." Toll packers do not acquire ownership of the commodity but instead provide a packing service for a fee.

reports); (2) fifty-eight violations of 7 C.F.R. § 989.58(d) (failing to obtain incoming inspections); (3) 592 violations of 7 C.F.R. § 989.66 and 7 C.F.R. § 989.166 (failing to hold reserve raisins for the 2002-03 and 2003-04 crop years); (4) two violations of 7 C.F.R. § 989.80 (failing to pay assessments to the RAC); and (5) one violation of 7 C.F.R. § 989.77 (failing to allow the Agricultural Marketing Service access to records). The JO accordingly ordered the Hornes to pay (1) $8,783.39 in unpaid assessments for the 2002-03 and 2003-04 crop years, pursuant to 7 C.F.R. § 989.80(a); (2) $483,843.53, the alleged dollar equivalent of the withheld raisin reserve contributions for the 2002-03 (632,427 pounds) and 2003-04 (611,159 pounds[11]) crop years, pursuant to 7 C.F.R. § 989.166(c); and (3) $202,600 in civil penalties, pursuant to 7 U.S.C. § 608c(14)(B).

The Hornes filed this action in district court seeking judicial review of a final agency decision pursuant to 7 U.S.C. § 608c(14)(B).[12] On cross-motions for summary judgment, the district court

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[11] The Hornes do not challenge the JO's calculation of these figures.

[12] In a separate action not the subject of this appeal, the Hornes filed an administrative petition before the Secretary of Agriculture in March 2007 pursuant to 7 U.S.C. § 608c(15)(A) challenging the Raisin Marketing Order and its application to them. The JO granted the USDA's motion to dismiss for lack of standing. The Hornes filed a complaint in district court, but the district court dismissed it for lack of subject matter jurisdiction because it was not timely filed, and we affirmed. *See Horne v. U.S. Dep't of Agric.*, 395 Fed. Appx. 486 (9th Cir. Sep. 27, 2010) (unpublished).

granted summary judgment for the USDA, and the Hornes timely appealed.

STANDARDS OF REVIEW

A district court's grant of summary judgment is reviewed de novo. *Ariz. Life Coal., Inc. v. Stanton*, 515 F.3d 956, 962 (9th Cir. 2008). Viewing the evidence in the light most favorable to the non-moving party, we must determine whether any genuine issues of material fact remain and whether the district court correctly applied the relevant substantive law. *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc). We review de novo a constitutional challenge to a federal regulation. *Doe v. Rumsfeld*, 435 F.3d 980, 984 (9th Cir. 2006) (citing *Gonzales v. Metro. Transp. Auth.*, 174 F.3d 1016, 1018 (9th Cir. 1999)). We also review de novo whether a fine is unconstitutionally excessive. *United States v. Mackby*, 339 F.3d 1013, 1016 (9th Cir. 2003) (*citing United States v. Bajakajian*, 524 U.S. 321, 337 n.10 (1998)).

DISCUSSION

I. Application of the Raisin Marketing Order to the Hornes

For the reasons discussed in the district court's opinion below, we conclude that the Hornes, who admit that their tollpacking business "stems, sorts, cleans," and "packages raisins for market as raisins," 7 C.F.R. § 989.14, satisfy the regulatory definition of a "packer" and are thus "handlers" subject to the Raisin Marketing Order's provisions, *see* 7 C.F.R. § 989.15. *See Horne v. U.S. Dep't of Agric.*, 2009 U.S. Dist. LEXIS 115464, at *20-49 (E.D. Cal. Dec. 11, 2009). The USDA's interpretation of its own

regulation is not "plainly erroneous or inconsistent with the regulation" and thus must be given "controlling weight." *See Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *accord Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Miller v. Cal. Speedway Corp.*, 536 F.3d 1020, 1028 (9th Cir. 2008). Furthermore, its findings regarding the Hornes' handler operations are supported by substantial evidence and are neither arbitrary nor capricious. *See* 5 U.S.C. § 706(2)(A), (E).

The Hornes argue they are statutorily exempt from regulation because they also satisfy the regulatory definition of a "producer," and the AMAA provides that "[n]o order issued under this chapter shall be applicable to any producer in his capacity as a producer." 7 U.S.C. § 608c(13)(B). However, by expressly limiting the exemption from regulation only to a producer "in his capacity as a producer," the AMAA contemplates that an individual who performs both producer and handler functions may still be regulated in his capacity as a handler. Even if the AMAA is considered "silent or ambiguous" on the regulation of individuals who perform both producer and handler functions, we must give *Chevron* deference to the permissible interpretation of the Secretary of Agriculture, who is charged with administering the statute. *Chevron, USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *see* 7 U.S.C. § 608c(1); *see also Morales-Izquierdo v. Dep't of Homeland Sec.*, 600 F.3d 1076, 1086-87 (9th Cir. 2010); *Midway Farms v. U.S. Dep't of Agric.*, 188 F.3d 1136, 1140 n.5 (9th Cir. 1999). Other courts have similarly rejected the Hornes' argument that a producer who handles his own product for market is statutorily exempt from

regulation under the AMAA. *See, e.g., Freeman v. Vance*, 319 F.2d 841, 842 (5th Cir. 1963) (per curiam); *Ideal Farms, Inc. v. Benson*, 288 F.2d 608, 614 (3d Cir. 1961), *cert. denied*, 372 U.S. 965 (1963); *Evans*, 74 Fed. Cl. at 557-58. Deferring to the agency's permissible interpretation of the statute, as we must, we conclude that applying the Raisin Marketing Order to the Hornes in their capacity as handlers was not contrary to the AMAA.

II. Takings Claim

The Hornes argue that, even if they are handlers subject to the Raisin Marketing Order's provisions, the requirement that they contribute a specified percentage of their annual raisin crop to the government-controlled reserve pool constitutes an uncompensated *per se* taking in violation of the Fifth Amendment.

The Fifth Amendment Takings Clause does not prohibit the government from taking private property; instead, it imposes conditions on the government's authority to act, providing that *when* government takes private property, pursuant to the lawful exercise of its constitutional powers, (1) it must take for public rather than private use, and (2) it must provide owners with just compensation, as measured by the property owner's loss. *See Brown v. Legal Found. of Wash.*, 538 U.S. 216, 231-32, 235-36 (2003); *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304, 314 (1987). The former condition ensures that government does not abuse its powers by taking private property for another's private gain, *see, e.g., Penn. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922); the latter ensures that even when government acts

in the public interest, it does not "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Armstrong v. United States*, 364 U.S. 40, 49 (1960). As a preliminary matter, we must decide whether we have jurisdiction over the Hornes' takings claim.

As we explained in *Bay View, Inc. v. AHTNA, Inc.*, 105 F.3d 1281 (9th Cir. 1997), the just-compensation requirement does not force the government to provide immediate compensation at the time of a taking; "it must simply 'provide an adequate process for obtaining compensation.' " *Id.* at 1285 (quoting *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985)). The Tucker Act allows parties seeking compensation from the United States to bring suit in the Court of Federal Claims. 28 U.S.C. § 1491(a)(1). Thus, a takings claim against the federal government must be brought there in the first instance, "unless Congress has withdrawn the Tucker Act grant of jurisdiction in the relevant statute." *Eastern Enters. v. Apfel*, 524 U.S. 498, 520 (1998) (plurality opinion).

Here, the government contends that the takings claim before us is premature because the Hornes have yet to avail themselves of Tucker Act process available to them in the Court of Federal Claims. The Hornes, however, argue that the AMAA withdraws Tucker Act jurisdiction for takings challenges to AMAA marketing orders and enforcement actions, and that the claim is therefore properly before us.

Section 8c(15) of the AMAA, 7 U.S.C. § 608c(15), "provides an administrative remedy to handlers

wishing to challenge marketing orders under the AMAA; requires that the Secretary [of Agriculture] grant a hearing and make a ruling on petitions brought by handlers; and vests the district courts with jurisdiction to review the Secretary's decision." *Lion Raisins, Inc. v. United States*, 416 F.3d 1356, 1370 (Fed. Cir. 2005). The case law the Hornes cite makes clear that when a handler, or a producer-handler in its capacity as a handler, challenges a marketing order on takings grounds, Court of Federal Claims Tucker Act jurisdiction gives way to section 8c(15)'s comprehensive procedural scheme and administrative exhaustion requirements. *See id.* at 1370-71 (holding that raisin producer-handler asserting a takings claim "only in its capacity as a handler" could effectively bring that claim in section 8c(15) proceedings and that a handler "may not seek compensation in the Court of Federal Claims under the guise of a takings claim for what is essentially a challenge to invalid agency action"); *see also United States v. Ruzicka*, 329 U.S. 287, 292-93, 295 (1946) (holding that a handler's challenges to a marketing order could only be raised using the special statutory procedure provided by section 8c(15)); *cf. Wallace v. Hudson-Duncan & Co.*, 98 F.2d 985 (9th Cir. 1938) (asserting jurisdiction over a handler's claim that a walnut marketing order resulted in a taking of its private property).

However, the takings claim before us is brought by the Hornes not in their capacity as handlers but in their capacity as producers; the Hornes allege that the regulatory scheme at issue takes reserve-tonnage raisins belonging to producers, not property belonging to handlers. This claim is therefore not governed by holdings which address handlers'

takings claims, nor is it subject to section 8c(15)'s administrative exhaustion requirements. *See Edaleen Dairy, LLC v. Johanns*, 467 F.3d 778, 783 (D.C. Cir. 2006) (distinguishing suits brought in producer-handlers' capacity as producers from suits brought in their capacity as handlers); *Ark. Dairy-Co-op Ass'n, Inc. v. U.S. Dep't of Agric.*, 573 F.3d 815, 823 n.4 (D.C. Cir. 2009) ("Where a single entity acts as a vertically-integrated 'producer-handler,' it must exhaust [section 8c(15) process] before bringing suit in its capacity as a handler, but not when bringing suit in its capacity as a producer.") (citations omitted).

Nothing in the AMAA precludes the Hornes from alleging in the Court of Federal Claims that the reserve program injures them in their capacity as producers by subjecting them to a taking requiring compensation. Thus, they may bring the takings claim there under the Tucker Act. And since they *may* bring a Tucker Act claim, they are *required* to bring it before we can properly adjudicate the takings issue. *See Bay View*, 105 F.3d at 1285 ("The Tucker Act . . [is] an implicit promise by Congress to pay compensation for all takings of private property for public purposes. . . . Thus, appellants' takings claim is premature until they have availed themselves of the process provided by the Tucker Act.") (internal quotation marks and citations omitted).

Bay View makes clear that we lack jurisdiction to address the merits of the Hornes' takings claim where Congress has provided a means for compensation. The Hornes' takings argument therefore fails.

III. Excessive Fines Claim

Finally, in connection with their takings argument, the Hornes protest the JO's imposition of nearly $700,000 in combined assessments and fines, which they believe excessively penalizes them, in violation of the Eighth Amendment, for their justified refusal to deliver their own private property into the hands of the government. *See* U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

To prevail on an excessive fines claim, a plaintiff must establish (1) the assessment is imposed, at least in part, for punitive and not merely remedial purposes, and (2) the fine is excessive, or "grossly disproportional to the gravity of [the] offense" for which it is imposed. *Bajakajian*, 524 U.S. at 334; *see Engquist v. Or. Dep't of Agric.*, 478 F.3d 985, 1006 (9th Cir. 2007); *Mackby*, 339 F.3d at 1016. Although an excessive punitive civil fine is not beyond the Eighth Amendment's reach, *Hudson v. United States*, 522 U.S. 93, 103 (1997), civil forfeiture that merely "provides a reasonable form of liquidated damages" as compensation for government losses resulting from the unlawful activity is remedial, not punitive, and accordingly does not implicate the Eighth Amendment, *One Lot Emerald Cut Stones & One Ring v. United States*, 409 U.S. 232, 237 (1972); *see United States v. $273,969.04 U.S. Currency*, 164 F.3d 462, 466 (9th Cir. 1999); *Austin v. United States*, 509 U.S. 602, 622 n.14 (1993) ("[A] fine that serves purely remedial purposes cannot be considered 'excessive' in any event.").

Here, the district court correctly determined that the $8,783.39 in unpaid assessments imposed pursuant to 7 C.F.R. § 989.80(a) and the $483,843.53 in compensation for the withheld reserve-tonnage raisins imposed pursuant to 7 C.F.R. § 989.166(c) amounted to remedial rather than punitive forfeitures and that the Excessive Fines Clause therefore is inapplicable to those penalties. The JO's order that the Hornes pay assessments to the RAC was calculated solely to compensate the RAC for the mandatory assessments not paid. *See* 7 C.F.R. § 989.80(a) ("Each handler shall, with respect to free tonnage acquired by him . . . pay to the committee, upon demand, his pro rata share of the expenses . . which the Secretary finds will be incurred, as aforesaid, by the committee during each crop year . ."). Similarly, the JO's order that the Hornes compensate the RAC for the withheld reserve-tonnage raisins flowed inexorably from another remedial, non-punitive provision of the regulations. *See id.* § 989.166(c) ("A handler who fails to deliver to the Committee, upon request, any reserve tonnage raisins in the quantity and quality for which he has become obligated shall compensate the Committee for the amount of the loss resulting from his failure to so deliver," as determined by a fixed formula.). Calculation of the compensation amount is nondiscretionary and is limited by the extent of the government's loss. *Cf. $273,969.04*, 164 F.3d at 466 (inferring punitive nature of a sanction where it was not limited by the extent of the government's loss and was tied to commission of a crime). The JO's use of the "field price" to calculate the compensatory amount the Hornes owed the RAC for their withheld

reserve-tonnage raisins was consistent with the regulations. *See* 7 C.F.R. § 989.166(c).

The only sanction that implicates the Excessive Fines Clause is the $202,600 fine imposed pursuant to 7 U.S.C. § 608c(14)(B), but we again agree with the district court that this civil penalty, less than one-third the authorized statutory amount, is not "grossly disproportional to the gravity of [the Hornes'] offense." *Bajakajian*, 524 U.S. at 334. Although we have no set formula for determining the proportionality of a given penalty, relevant factors include the severity of the offense, the statutory maximum penalty available, and the harm caused by the offense. *Mackby*, 339 F.3d at 1016; *see also United States v. 3814 NW Thurman St.*, 164 F.3d 1191, 1197-98 (9th Cir. 1999).

We have previously recognized that noncompliance with a marketing order's reporting and reserve requirements are serious offenses that threaten the Secretary's ability to regulate a given market and prevent price destabilization, while also unjustly enriching the offenders who profit from selling their reserve-tonnage goods on the open market. *See Balice v. U.S. Dep't of Agric.*, 203 F.3d 684, 693, 695, 698-99 (9th Cir. 2000) (upholding a fine of $225,500 imposed on an almond handler subject to up to $528,000 in fines for violations of various reporting and reserve requirements). Furthermore, that Congress authorized a much steeper fine ($1,000 for each of the Hornes' 673 separate offenses spanning a two-year period, for a total of $673,000) than what the JO actually imposed, while not dispositive, weighs heavily against finding the fine grossly disproportional to the Hornes' offense, for

"judgments about the appropriate punishment for an offense belong in the first instance to the legislature." *Bajakajian*, 524 U.S. at 336, 339 n.14; *accord Balice*, 203 F.3d at 699.[13] In light of these factors, we cannot say the district court erred in finding the penalties consistent with the Eighth Amendment.[14]

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[13] Although in *Balice* it appears the JO imposed penalties under only 7 U.S.C. § 608c(14) and not under the regulation's forfeiture provisions, whereas here the JO imposed both, nothing in the statutory or regulatory language seems to preclude simultaneous imposition of remedial and punitive sanctions under the respective provisions. To the contrary, 7 C.F.R. § 989.166(c) expressly provides that compensation for failure to deliver reserve-tonnage raisins "shall be in addition to, and not exclusive of, any or all of the remedies or penalties prescribed in the act" for noncompliance with the act or regulation's requirements, and the Hornes do not challenge the legitimacy of this provision.

[14] We also reject the Hornes' contention that 7 U.S.C. § 608c(14)(B) exempts them from liability for their Raisin Marketing Order violations because in 2007 they filed an administrative petition pursuant to 7 U.S.C. § 608c(15)(A). *See* 7 U.S.C. § 608c(14)(B) (immunizing from civil penalty any handler who "in good faith and not for delay" files and prosecutes a qualifying administrative petition). First, this argument was already disposed of in one of our earlier decisions, *see Horne*, 397 Fed. Appx. at 486, and is not properly before us now. Moreover, even if the matter were properly before us, it is without merit. Section 608c(14)(B) only immunizes handlers from penalties otherwise incurred during the pendency of their administrative petition; it does not apply retroactively. Therefore, an administrative petition not filed until 2007 cannot immunize the Hornes from fines relating to their conduct in 2002-04.

CONCLUSION

The Hornes are clearly dissatisfied and frustrated with a regulatory scheme they believe no longer serves the interests of the farmers it was designed, in large part, to protect. That being the case, the Hornes may wish to pursue a takings claim in the Court of Federal Claims or attempt to impress upon the Secretary the need for reevaluation of the Raisin Marketing Order. *See* 7 U.S.C. § 608c(16) (prescribing mechanism for termination or suspension of marketing orders). Our role, however, is limited to reviewing the constitutionality and not the wisdom of the current regulation. We find no constitutional infirmity in either the Raisin Marketing Order or the Secretary's application of it to the Hornes, and indeed lack jurisdiction to find such an infirmity on takings grounds until the Hornes avail themselves of Tucker Act process in the Court of Federal Claims. The summary judgment of the district court is **AFFIRMED.**

SUPREME COURT OF THE UNITED STATES

No. 12–123

MARVIN D. HORNE, ET AL., PETITIONERS v. DEPARTMENT OF AGRICULTURE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 10, 2013]

JUSTICE THOMAS delivered the opinion of the Court.

Under the Agricultural Marketing Agreement Act of 1937 (AMAA) and the California Raisin Marketing Order (Marketing Order or Order) promulgated by the Secretary of Agriculture, raisin growers are frequently required to turn over a percentage of their crop to the Federal Government. The AMAA and the Marketing Order were adopted to stabilize prices by limiting the supply of raisins on the market. Petitioners are California raisin growers who believe that this regulatory scheme violates the Fifth Amendment. After petitioners refused to surrender the requisite portion of their raisins, the United States Department of Agriculture (USDA) began administrative proceedings against petitioners that led to the imposition of more than $650,000 in fines and civil penalties. Petitioners sought judicial review, claiming that the monetary sanctions were an unconstitutional taking of private property without just compensation. The Ninth Circuit held that petitioners were required to bring their takings claim in the Court of Federal Claims and that it

therefore lacked jurisdiction to review petitioners' claim. We disagree. Petitioners' takings claim, raised as an affirmative defense to the agency's enforcement action, was properly before the court because the AMAA provides a comprehensive remedial scheme that withdraws Tucker Act jurisdiction over takings claims brought by raisin handlers. Accordingly, we reverse and remand to the Ninth Circuit.

I

A

Congress enacted the AMAA during the Great Depression in an effort to insulate farmers from competitive market forces that it believed caused "unreasonable fluctuations in supplies and prices." Ch. 296, 50 Stat. 246, as amended, 7 U.S.C. § 602(4). To achieve this goal, Congress declared a national policy of stabilizing prices for agricultural commodities. *Ibid.* The AMAA authorizes the Secretary of Agriculture to promulgate marketing orders that regulate the sale and delivery of agricultural goods. § 608c(1); *see also Block v. Community Nutrition Institute*, 467 U.S. 340, 346 (1984) ("The Act contemplates a cooperative venture among the Secretary, handlers, and producers the principal purposes of which are to raise the price of agricultural products and to establish an orderly system for marketing them"). The Secretary may delegate to industry committees the authority to administer marketing orders. § 608c(7)(C).

The AMAA does not directly regulate the "producer[s]" who grow agricultural commodities, § 608c(13)(B); it only regulates "handlers," which the

AMAA defines as "processors, associations of producers, and others engaged in the handling" of covered agricultural commodities. § 608c(1). Handlers who violate the Secretary's marketing orders may be subject to civil and criminal penalties. §§ 608a(5), 608a(6), and 608c(14).

The Secretary promulgated a marketing order for California raisins in 1949.[1]1 See 14 Fed. Reg. 5136 (codified, as amended, at 7 C.F.R. pt. 989 (2013)). In particular, "[t]he Raisin Marketing Order, like other fruit and vegetable orders adopted under the AMAA, [sought] to stabilize producer returns by limiting the quantity of raisins sold by handlers in the domestic competitive market." *Lion Raisins, Inc. v. United States*, 416 F.3d 1356, 1359 (CA Fed. 2005). The Marketing Order defines a raisin "handler" as "(a) [a]ny processor or packer; (b) [a]ny person who places . . . raisins in the current of commerce from within [California] to any point outside thereof; (c) [a]ny person who delivers off-grade raisins . . into any eligible non-normal outlet; or (d) [a]ny person who blends raisins [subject to certain exceptions]." 7 C.F.R. § 989.15.

The Marketing Order also established the Raisin Administrative Committee (RAC), which consists of 47 members, with 35 representing producers, ten representing handlers, one representing the cooperative bargaining associations, and one member

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[1] The AMAA also applies to a vast array of other agricultural products, including "[m]ilk, fruits (including filberts, almonds, pecans and walnuts , pears, olives, grapefruit, cherries, caneberries (including raspberries, blackberries, and loganberries), cranberries, tobacco, vegetables, hops, [and] honeybees." § 608c(2).

of the public. See § 989.26. The Marketing Order authorizes the RAC to recommend setting up annual reserve pools of raisins that are not to be sold on the open domestic market. See 7 U.S.C. § 608c(6)(E); 7 C.F.R. §§ 989.54(d) and 989.65. Each year, the RAC reviews crop yield, inventories, and shipments and makes recommendations to the Secretary whether or not there should be a reserve pool. § 989.54. If the RAC recommends a reserve pool, it also recommends what portion of that year's production should be included in the pool ("reserve-tonnage"). The rest of that year's production remains available for sale on the open market ("free-tonnage"). §§ 989.54(d), (a). The Secretary approves the recommendation if he determines that the recommendation would "effectuate the declared policy of the Act." § 989.55. The reserve-tonnage, calculated as a percentage of a producer's crop, varies from year to year.[2]

Under the Marketing Order's reserve requirements, a producer is only paid for the free-tonnage raisins. § 989.65. The reserve-tonnage raisins, on the other hand, must be held by the handler in segregated bins "for the account" of the RAC. § 989.66(f). The RAC may then sell the reserve-tonnage raisins to handlers for resale in overseas markets, or may alternatively direct that they be sold or given at no cost to secondary, noncompetitive domestic markets, such as school lunch programs. § 989.67(b). The reserve pool sales proceeds are used to finance the RAC's

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[2] In 2002–2003 and 2003–2004, the crop years at issue here, the reserve percentages were set at 47 percent and 30 percent of a producer's crop, respectively. See RAC, Marketing Policy & Industry Statistics 2012, p. 28 (Table 12).

administrative costs. §989.53(a). In the event that there are any remaining funds, the producers receive a pro rata share. 7 U.S.C. § 608c(6)(E); 7 C.F.R. § 989.66(h). As a result, even though producers do not receive payment for reserve-tonnage raisins at the time of delivery to a handler, they retain a limited interest in the net proceeds of the RAC's disposition of the reserve pool.

Handlers have other duties beyond managing the RAC's reserve pool. The Marketing Order requires them to file certain reports with the RAC, such as reports concerning the quantity of raisins that they hold or acquire. § 989.73. They are also required to allow the RAC access to their premises, raisins, and business records to verify the accuracy of the handlers' reports, § 989.77, to obtain inspections of raisins acquired, § 989.58(d), and to pay certain assessments, § 989.80, which help cover the RAC's administrative costs. A handler who violates any provision of the Order or its implementing regulations is subject to a civil penalty of up to $1,100 per day. 7 U.S.C. § 608c(14)(B); 7 C.F.R. §3.91(b)(1)(vii). A handler who does not comply with the reserve requirement must "compensate the [RAC] for the amount of the loss resulting from his failure to . . . deliver" the requisite raisins. § 989.166(c).

B

Petitioners Marvin and Laura Horne have been producing raisins in two California counties (Fresno and Madera) since 1969. The Hornes do business as Raisin Valley Farms, a general partnership. For more than 30 years, the Hornes operated only as raisin producers. But, after becoming disillusioned with the AMAA regulatory scheme,[3] they began looking for ways to avoid the mandatory reserve program. Since the AMAA applies only to handlers, the Hornes devised a plan to bring their raisins to market without going through a traditional handler. To this end, the Hornes entered into a partnership with Mrs. Horne's parents called Lassen Vineyards. In addition to its grape-growing activities, Lassen Vineyards purchased equipment to clean, stem, sort, and package the raisins from Raisin Valley Farms and Lassen Vineyards. It also contracted with more than 60 other raisin growers to clean, stem, sort, and, in some cases, box and stack their raisins for a fee. The Hornes' facilities processed more than 3 million pounds of raisins *in toto* during the 2002–

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[3] The Hornes wrote the Secretary and to the RAC in 2002 setting out their grievances: "[W]e are growers that will pack and market our raisins. We reserve our rights under the Constitution of the United States [T]he Marketing Order Regulating Raisins has become a tool for grower bankruptcy, poverty, and involuntary servitude. The Marketing Order Regulating Raisins is a complete failure for growers, handlers, and the USDA [W]e will not relinquish ownership of our crop. We put forth the money and effort to grow it, not the Raisin Administrative Committee. This is America, not a communist state." App. to Pet. for Cert. 60a.

2003 and 2003–2004 crop years. During these two crop years, the Hornes produced 27.4% and 12.3% of the raisins they processed, respectively.

Although the USDA informed the Hornes in 2001 that their proposed operations made them "handlers" under the AMAA, the Hornes paid no assessments to the RAC during the 2002–2003 and 2003–2004 crop years. Nor did they set aside reserve-tonnage raisins from those produced and owned by the more than 60 other farmers who contracted with Lassen Vineyards for packing services. They also declined to arrange for RAC inspection of the raisins they received for processing, denied the RAC access to their records, and held none of their own raisins in reserve.

On April 1, 2004, the Administrator of the Agriculture Marketing Service (Administrator) initiated an enforcement action against the Hornes, Raisin Valley Farms, and Lassen Vineyards (petitioners). The complaint alleged that petitioners were "handlers" of California raisins during the 2002–2003 and 2003–2004 crop years. It also alleged that petitioners violated the AMAA and the Marketing Order by submitting inaccurate forms to the RAC and failing to hold inspections of incoming raisins, retain raisins in reserve, pay assessments, and allow access to their records. Petitioners denied the allegations, countering that they were not "handlers" and asserting that they did not acquire physical possession of the other producers' raisins within the meaning of the regulations. Petitioners also raised several affirmative defenses, including a claim that the Marketing Order violated the Fifth Amendment's prohibition against taking property without just compensation.

An Administrative Law Judge (ALJ) concluded in 2006 that petitioners were handlers of raisins and thus subject to the Marketing Order. The ALJ also concluded that petitioners violated the AMAA and the Marketing Order and rejected petitioners' takings defense based on its view that "handlers no longer have a property right that permits them to market their crop free of regulatory control." App. 39 (citing *Cal-Almond, Inc. v. United States*, 30 Fed. Cl. 244, 246–247 (1994)).

Petitioners appealed to a judicial officer who, like the ALJ, also found that petitioners were handlers and that they had violated the Marketing Order. The judicial officer imposed $202,600 in civil penalties under 7 U.S.C. § 608c(14)(B); $8,783.39 in assessments for the two crop years under 7 C.F.R. § 989.80(a); and $483,843.53 for the value of the California raisins that petitioners failed to hold in reserve for the two crop years under § 989.166(c). The judicial officer believed that he lacked "authority to judge the constitutionality of the various statutes administered by the [USDA]," App. 73, and declined to adjudicate petitioners' takings claim.

Petitioners filed a complaint in Federal District Court seeking judicial review of the USDA's decision. See 7 U.S.C. § 608c(14)(B). The District Court granted summary judgment to the USDA. The court held that substantial evidence supported the agency's determination that petitioners were "handlers" subject to the Marketing Order, and rejected petitioners' argument that they were exempt from the Marketing Order due to their status as "producers" under § 608c(13)(B). No. CV–F–08–1549 LJO SMS, 2009 WL 4895362, *15 (ED Cal., Dec. 11,

2009). Petitioners renewed their Fifth Amendment argument, asserting that the reserve-tonnage requirement constituted a physical taking. Though the District Court found that the RAC takes title to a significant portion of a California raisin producer's crop through the reserve requirement, the court held that the transfer of title to the RAC did not constitute a physical taking. See *id.*, at *26 ("'[I]n essence, [petitioners] are paying an admissions fee or toll—admittedly a steep one—for marketing raisins. The Government does not force plaintiffs to grow raisins or to market the raisins; rather, it directs that if they grow and market raisins, then passing title to their "reserve tonnage" raisins to the RAC is the admissions ticket'" (quoting *Evans v. United States*, 74 Fed. Cl. 554, 563–564 (2006))).

The Ninth Circuit affirmed. The court agreed that petitioners were "handlers" subject to the Marketing Order's provisions, and rejected petitioners' argument that they were producers, and, thus exempt from regulation. 673 F.3d 1071, 1078 (2012). The court did not resolve petitioners' takings claim, however, because it concluded that that it lacked jurisdiction to do so. The court explained that "a takings claim against the federal government must be brought [in the Court of Federal Claims] in the first instance, 'unless Congress has withdrawn the Tucker Act grant of jurisdiction in the relevant statute.'" *Id.*, at 1079 (quoting *Eastern Enterprises v. Apfel*, 524 U.S. 498, 520 (1998) (plurality opinion)). The court recognized that 7 U.S.C. § 608c(15) provides an administrative remedy to handlers wishing to challenge marketing orders under the AMAA, and it agreed that "when a handler, or a producer-handler in its capacity as a handler,

challenges a marketing order on takings grounds, Court of Federal Claims Tucker Act jurisdiction gives way to section [60]8c(15)'s comprehensive procedural scheme and administrative exhaustion requirements." 673 F.3d, at 1079. But, the Ninth Circuit determined, petitioners brought the takings claim in their capacity as producers, not handlers. *Id.*, at 1080. Consequently, the court was of the view that "[n]othing in the AMAA precludes the Hornes from alleging in the Court of Federal Claims that the reserve program injures them in their capacity as producers by subjecting them to a taking requiring compensation." *Ibid.* This availability of a Federal Claims Court action thus rendered petitioners' takings claim unripe for adjudication. *Ibid.*

We granted certiorari to determine whether the Ninth Circuit has jurisdiction to review petitioners' takings claim. 568 U.S. ___, 133 S. Ct. 638 (2012).

II

A

The Ninth Circuit's jurisdictional ruling flowed from its determination that petitioners brought their takings claim as producers rather than handlers. This determination is not correct. Although petitioners argued that they were producers—and thus not subject to the AMAA or Marketing Order at all—both the USDA and the District Court concluded that petitioners were "handlers." Accordingly, the civil penalty, assessment, and reimbursement for failure to reserve raisins were all levied on petitioners in their capacity as "handlers." If petitioners' argument that they were producers had prevailed, they would not have been subject to *any* of

the monetary sanctions imposed on them. See 7 U.S.C. § 608c(13)(B) ("No order issued under this chapter shall be applicable to any producer in his capacity as a producer").

It is undisputed that the Marketing Order imposes duties on petitioners only in their capacity as handlers. As a result, any defense raised against those duties is necessarily raised in that same capacity. Petitioners argue that it would be unconstitutional for the Government to come on their land and confiscate raisins, or to confiscate the proceeds of raisin sales, without paying just compensation; and, that it is therefore unconstitutional to fine petitioners for not complying with the unconstitutional requirement.[4] See Brief for Petitioners 54. Given that fines can only be levied on handlers, petitioners' takings claim makes sense only as a defense to penalties imposed upon them in their capacity *as handlers*. The Ninth Circuit confused petitioners' statutory argument (*i.e.*, "we are producers, not handlers") with their constitutional argument (*i.e.*, "assuming we are

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[4] The Ninth Circuit construed the takings argument quite differently, stating that petitioners believe the regulatory scheme "takes reserve-tonnage raisins belonging to producers." 673 F.3d 1071, 1080 (2012). When the agency brought its enforcement action against petitioners, however, it did not seek to recover reserve-tonnage raisins from the 2002–2003 and 2003–2004 crop years. Rather, it sought monetary penalties and reimbursement. Petitioners could not argue in the face of such agency action that the Secretary was attempting to take raisins that had already been harvested and sold. Instead, petitioners argued that they could not be compelled to pay fines for refusing to accede to an unconstitutional taking.

handlers, fining us for refusing to turn over reserve-tonnage raisins violates the Fifth Amendment").[5]

The relevant question, then, is whether a federal court has jurisdiction to adjudicate a takings defense raised by a handler seeking review of a final agency order.

B

The Government argues that petitioners' takings-based defense was rightly dismissed on ripeness grounds. Brief for Respondent 21–22. According to the Government, because a takings claim can be pursued later in the Court of Federal Claims, the Ninth Circuit correctly refused to adjudicate petitioners' takings defense. In support of its position, the Government relies largely on *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). Brief for Respondent 21–22 ("Just compensation need not 'be paid in advance of, or contemporaneously with, the taking; all that is required is that a 'reasonable, certain and adequate provision for obtaining compensation' exist at the time of the taking'" (quoting *Williamson County*, 473

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[5] The Government notes that petitioners did not own most of the raisins that they failed to reserve and argues that petitioners would have no takings claim based on those raisins. See Brief for Respondent 19. We take no position on the merits of petitioners' takings claim. We simply recognize that insofar as the petitioners challenged the imposition of monetary sanctions under the Marketing Order, they raised their takings-based defense in their capacity as handlers. On remand, the Ninth Circuit can decide in the first instance whether petitioners may raise the takings defense with respect to raisins they never owned.

U.S., at 194)). In that case, the plaintiff filed suit against the Regional Planning Commission, claiming that a zoning decision by the Commission effected a taking of property without just compensation. *Id.*, at 182. We found that the plaintiff 's claim was not "ripe" for two reasons, neither of which supports the Government's position.

First, we explained that the plaintiff 's takings claim in *Williamson County* failed because the plaintiff could not show that it had been injured by the Government's action. Specifically, the plaintiff "ha[d] not yet obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property." *Id.*, at 186. Here, by contrast, petitioners were subject to a final agency order imposing concrete fines and penalties at the time they sought judicial review under § 608c(14)(B). This was clearly sufficient "injury" for federal jurisdiction.

Second, the *Williamson County* plaintiff 's takings claim was not yet ripe because the plaintiff had not sought "compensation through the procedures the State ha[d] provided for doing so." *Id.*, at 194. We explained that "[i]f the government has provided an adequate process for obtaining compensation, and if resort to that process yields just compensation, then the property owner has no claim against the Government for a taking." *Id.*, at 194–195 (internal quotation marks and alteration omitted). Stated differently, a Fifth Amendment claim is premature until it is clear that the Government has both taken property and denied just compensation. Although we often refer to this consideration as "prudential 'ripeness,'" *Lucas v. South Carolina Coastal Council*,

505 U.S. 1003, 1013 (1992), we have recognized that it is not, strictly speaking, jurisdictional.[6] See *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, 560 U.S. 702, ___, and n.10, 130 S. Ct. 2592, 2610 and n.10 (2010).

Here, the Government argues that petitioners' takings claim is premature because the Tucker Act affords "the requisite reasonable, certain, and adequate provision for obtaining just compensation that a property owner must pursue." Brief for Respondent 22. In the Government's view, "[p]etitioners should have complied with the order, and, after a portion of their raisins were placed in reserve to be disposed of as directed by the RAC, . . sought compensation as producers in the Court of Federal Claims for the alleged taking." *Id.*, at 24–25. We disagree with the Government's argument, however, because the AMAA provides a comprehensive remedial scheme that withdraws Tucker Act jurisdiction over a handler's takings claim. As a result, there is no alternative "reasonable, certain, and adequate" remedial scheme through which petitioners (as handlers) must proceed before obtaining review of their claim under the AMAA.[7]

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[6] A "Case" or "Controversy" exists once the government has taken private property without paying for it. Accordingly, whether an alternative remedy exists does not affect the jurisdiction of the federal court.

[7] That is not to say that a producer who turns over her reserve-tonnage raisins could not bring suit for just compensation in the Court of Claims. Whether a producer could bring such a claim, and what impact the availability of such a claim would have on petitioners' takings-based defense, are questions going to the

The Court of Federal Claims has jurisdiction over Tucker Act claims "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department." 28 U.S.C. § 1491(a)(1). "[A] claim for just compensation under the Takings Clause must be brought to the Court of Federal Claims in the first instance, unless Congress has withdrawn the Tucker Act grant of jurisdiction in the relevant statute." *Eastern Enterprises*, 524 U.S., at 520 (plurality opinion); see also *United States v. Bormes*, 568 U.S. ___, ___, 133 S. Ct. 12, 17 (2012) (where "a statute contains its own self-executing remedial scheme," a court "look[s] only to that statute"). To determine whether a statutory scheme displaces Tucker Act jurisdiction, a court must "examin[e] the purpose of the [statute], the entirety of its text, and the structure of review that it establishes." *United States v. Fausto*, 484 U.S. 439, 444 (1988).

Under the AMAA's comprehensive remedial scheme, handlers may challenge the content, applicability, and enforcement of marketing orders. Pursuant to §§ 608c(15) (A)–(B), a handler may file with the Secretary a direct challenge to a marketing order and its applicability to him. We have held that "any handler" subject to a marketing order must raise any challenges to the order, including constitutional challenges, in administrative proceedings. See *United States v. Ruzicka*, 329 U.S. 287, 294 (1946). Once the Secretary issues a ruling, the federal district court where the "handler is an inhabitant, or has his principal place of business" is

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merits of petitioners' defense, not to a court's jurisdiction to entertain it. We therefore do not address those issues here.

"vested with jurisdiction . . . to review [the] ruling."[8] § 608c(15)(B). These statutory provisions afford handlers a ready avenue to bring takings claim against the USDA. We thus conclude that the AMAA withdraws Tucker Act jurisdiction over petitioners' takings claim. Petitioners (as handlers) have no alternative remedy, and their takings claim was not "premature" when presented to the Ninth Circuit.

C

Although petitioners' claim was not "premature" for Tucker Act purposes, the question remains whether a takings-based defense may be raised by a handler in the context of an enforcement proceeding initiated by the USDA under § 608c(14). We hold that it may. The AMAA provides that the handler may not be subjected to an adverse order until he has been given "notice and an opportunity for an agency hearing on the record." § 608c(14)(B). The text of § 608c(14)(B) does not bar handlers from raising constitutional defenses to the USDA's enforcement action. Allowing handlers to raise constitutional challenges in the course of enforcement proceedings would not diminish the

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[8] Petitioners filed an administrative petition before the Secretary in March 2007 pursuant to § 608c(15)(A) challenging the Marketing Order and its application to them. The USDA argued that they had no standing to file the petition because they had not admitted that they were handlers. The judicial officer granted the USDA's motion to dismiss the petition for lack of jurisdiction. Petitioners filed a complaint in District Court, but the court dismissed it as untimely. The Ninth Circuit affirmed. See *Horne v. Dept. of Agriculture*, 395 Fed. Appx. 486 (2010).

incentive to file direct challenges to marketing orders under § 608c(15)(A) because a handler who refuses to comply with a marketing order and waits for an enforcement action will be liable for significant monetary penalties if his constitutional challenge fails.

In the case of an administrative enforcement proceeding, when a party raises a constitutional defense to an assessed fine, it would make little sense to require the party to pay the fine in one proceeding and then turn around and sue for recovery of that same money in another proceeding. See *Eastern Enterprises*, *supra*, at 520. We see no indication that Congress intended this result for handlers subject to enforcement proceedings under the AMAA. Petitioners were therefore free to raise their takings-based defense before the USDA. And, because § 608c(14)(B) allows a handler to seek judicial review of an adverse order, the district court and Ninth Circuit were not precluded from reviewing petitioners' constitutional challenge. The grant of jurisdiction necessarily includes the power to review any constitutional challenges properly presented to and rejected by the agency. We are therefore satisfied that the petitioners raised a cognizable takings defense and that the Ninth Circuit erred in declining to adjudicate it.

III

The Ninth Circuit has jurisdiction to decide whether the USDA's imposition of fines and civil penalties on petitioners, in their capacity as handlers, violated the Fifth Amendment. The judgment of the Ninth Circuit is reversed, and the

case is remanded for further proceedings consistent with this opinion.

It is so ordered.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARVIN D. HORNE and LAURA R. HORNE, d.b.a. RAISIN VALLEY FARMS, a partnership, and d.b.a. RAISIN VALLEY FARMS MARKETING ASSOCIATION, a.k.a. RAISIN VALLEY MARKETING, an unincorporated association; MARVIN D. HORNE; LAURA R. HORNE; DON DURBAHN, and the ESTATE OF RENA DURBAHN, d.b.a. LASSEN VINEYARDS, a partnership,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant-Appellee.

No. 10-15270

D.C. No. 1:08-cv-01549-LJO-SMS
Eastern District of California
Fresno

ORDER

Before: REINHARDT, HAWKINS, and GOULD, Circuit Judges.

The opinion filed July 25, 2011, slip op. 9453, and appearing at ___ F.3d ___, No. 10-15270,

2011 WL 2988902 (9th Cir. 2011), is hereby amended per the Amended Opinion filed concurrently with this Order.

The panel has voted to deny the petition for panel rehearing. Judges Reinhardt and Gould have voted to deny the petition for panel rehearing en banc, and Judge Hawkins has so recommended.

The full court was advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are **DENIED**.

No further petitions for rehearing or rehearing en banc will be accepted for filing.

7 U.S.C. § 608a - Enforcement of chapter

(1) to (4) Omitted

(5) Forfeitures

Any person exceeding any quota or allotment fixed for him under this chapter by the Secretary of Agriculture and any other person knowingly participating or aiding in the exceeding of such quota or allotment shall forfeit to the United States a sum equal to the value of such excess at the current market price for such commodity at the time of violation, which forfeiture shall be recoverable in a civil suit brought in the name of the United States.

(6) Jurisdiction of district courts

The several district courts of the United States are vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement, heretofore or hereafter made or issued pursuant to this chapter, in any proceeding now pending or hereafter brought in said courts.

(7) Duties of United States attorneys; investigation of violations by Secretary; hearings

Upon the request of the Secretary of Agriculture, it shall be the duty of the several United States attorneys, in their respective districts, under the directions of the Attorney General, to institute proceedings to enforce the remedies and to collect the forfeitures provided for in, or pursuant to this chapter. Whenever the Secretary, or such officer or employee of the Department of Agriculture as he may designate for the purpose, has reason to believe

that any handler has violated, or is violating, the provisions of any order or amendment thereto issued pursuant to this chapter, the Secretary shall have power to institute an investigation and, after due notice to such handler, to conduct a hearing in order to determine the facts for the purpose of referring the matter to the Attorney General for appropriate action.

(8) Cumulative remedies

The remedies provided for in this section shall be in addition to, and not exclusive of, any of the remedies or penalties provided for elsewhere in this chapter or now or hereafter existing at law or in equity.

The term "person" as used in this chapter includes an individual, partnership, corporation, association, and any other business unit.

* * *

7 U.S.C. § 608c - Orders

(1) Issuance by Secretary

The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers" Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or

foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof. In carrying out this section, the Secretary shall complete all informal rulemaking actions necessary to respond to recommendations submitted by administrative committees for such orders as expeditiously as possible, but not more than 45 days (to the extent practicable) after submission of the committee recommendations. The Secretary is authorized to implement a producer allotment program and a handler withholding program under the cranberry marketing order in the same crop year through informal rulemaking based on a recommendation and supporting economic analysis submitted by the Cranberry Marketing Committee. Such recommendation and analysis shall be submitted by the Committee no later than March 1 of each year. The Secretary shall establish time frames for each office and agency within the Department of Agriculture to consider the committee recommendations.

(2) Commodities to which applicable

Orders issued pursuant to this section shall be applicable only to (A) the following agricultural commodities and the products thereof (except canned or frozen pears, grapefruit, cherries, apples, or cranberries, the products of naval stores, and the products of honeybees), or to any regional, or market classification of any such commodity or product: Milk, fruits (including filberts, almonds, pecans and walnuts but not including apples, other than apples produced in the States of Washington, Oregon,

Idaho, New York, Michigan, Maryland, New Jersey, Indiana, California, Maine, Vermont, New Hampshire, Rhode Island, Massachusetts, Connecticut, Colorado, Utah, New Mexico, Illinois, and Ohio, and not including fruits for canning or freezing other than pears, olives, grapefruit, cherries, caneberries (including raspberries, blackberries, and loganberries), cranberries, and apples produced in the States named above except Washington, Oregon, and Idaho), tobacco, vegetables (not including vegetables, other than asparagus, for canning or freezing and not including potatoes for canning, freezing, or other processing), hops, honeybees and naval stores as included in the Naval Stores Act [7 U.S.C.A. § 91 et seq.] and standards established thereunder (including refined or partially refined oleoresin): *Provided*, That no order issued pursuant to this section shall be effective as to any grapefruit for canning or freezing unless the Secretary of Agriculture determines, in addition to other findings and determinations required by this chapter, that the issuance of such order is approved or favored by the processors who, during a representative period determined by the Secretary, have been engaged in canning or freezing such commodity for market and have canned or frozen for market more than 50 per centum of the total volume of such commodity canned or frozen for market during such representative period; and (B) any agricultural commodity (except honey, cotton, rice, wheat, corn, grain sorghums, oats, barley, rye, sugarcane, sugarbeets, wool, mohair, livestock, soybeans, cottonseed, flaxseed, poultry (but not excepting turkeys and not excepting poultry which produce commercial eggs), fruits and vegetables for canning

or freezing, including potatoes for canning, freezing, or other processing and apples), or any regional or market classification thereof, not subject to orders under (A) of this subdivision, but not the products (including canned or frozen commodities or products) thereof. No order issued pursuant to this section shall be effective as to cherries, apples, or cranberries for canning or freezing unless the Secretary of Agriculture determines, in addition to other required findings and determinations, that the issuance of such order is approved or favored by processors who, during a representative period determined by the Secretary, have engaged in canning or freezing such commodity for market and have frozen or canned more than 50 per centum of the total volume of the commodity to be regulated which was canned or frozen within the production area, or marketed within the marketing area, defined in such order, during such representative period. No order issued pursuant to this section shall be applicable to peanuts produced in more than one of the following production areas: the Virginia-Carolina production area, the Southeast production area, and the Southwest production area. If the Secretary determines that the declared policy of this chapter will be better achieved thereby (i) the commodities of the same general class and used wholly or in part for the same purposes may be combined and treated as a single commodity and (ii) the portion of an agricultural commodity devoted to or marketed for a particular use or combination of uses, may be treated as a separate agricultural commodity. All agricultural commodities and products covered hereby shall be deemed specified

herein for the purposes of subsections (6) and (7) of this section.

(3) Notice and hearing

Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this chapter with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

(4) Finding and issuance of order

After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this chapter with respect to such commodity.

* * *

(6) Terms--Other commodities

In the case of the agricultural commodities and the products thereof, other than milk and its products, specified in subsection (2) of this section orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section), no others:

(A) Limiting, or providing methods for the limitation of, the total quantity of any such commodity or product, or of any grade, size, or quality thereof, produced during any specified period or periods, which may be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods by all handlers thereof.

(B) Allotting, or providing methods for allotting, the amount of such commodity or product, or any grade, size, or quality thereof, which each handler may purchase from or handle on behalf of any and all producers thereof, during any specified period or periods, under a uniform rule based upon the amounts sold by such producers in such prior period as the Secretary determines to be representative, or upon the current quantities available for sale by such producers, or both, to the end that the total quantity thereof to be purchased, or handled during any specified period or periods shall be apportioned equitably among producers.

(C) Allotting, or providing methods for allotting, the amount of any such commodity or product, or any grade, size, or quality thereof, which each handler may market in or transport to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, under a uniform rule based upon the amounts which each such handler

has available for current shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity or product, or any grade, size, or quality thereof, to be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods shall be equitably apportioned among all of the handlers thereof.

(D) Determining, or providing methods for determining, the existence and extent of the surplus of any such commodity or product, or of any grade, size, or quality thereof, and providing for the control and disposition of such surplus, and for equalizing the burden of such surplus elimination or control among the producers and handlers thereof.

(E) Establishing or providing for the establishment of reserve pools of any such commodity or product, or of any grade, size, or quality thereof, and providing for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein.

(F) Requiring or providing for the requirement of inspection of any such commodity or product produced during specified periods and marketed by handlers.

(G) In the case of hops and their products in addition to, or in lieu of, the foregoing terms and conditions, orders may contain one or more of the following:

(i) Limiting, or providing methods for the limitation of, the total quantity thereof, or of any grade, type, or variety thereof, produced during any specified period or periods, which all handlers may handle in the current of or so as directly to burden, obstruct, or affect interstate or foreign commerce in hops or any product thereof.

(ii) Apportioning, or providing methods for apportioning, the total quantity of hops of the production of the then current calendar year permitted to be handled equitably among all producers in the production area to which the order applies upon the basis of one or more or a combination of the following: The total quantity of hops available or estimated will become available for market by each producer from his production during such period; the normal production of the acreage of hops operated by each producer during such period upon the basis of the number of acres of hops in production, and the average yield of that acreage during such period as the Secretary determines to be representative, with adjustments determined by the Secretary to be proper for age of plantings or abnormal conditions affecting yield; such normal production or historical record of any acreage for which data as to yield of hops are not available or which had no yield during such period shall be determined by the Secretary on the basis of the yields of other acreage of hops of similar

characteristics as to productivity, subject to adjustment as just provided for.

(iii) Allotting, or providing methods for allotting, the quantity of hops which any handler may handle so that the allotment fixed for that handler shall be limited to the quantity of hops apportioned under preceding section (ii) to each respective producer of hops; such allotment shall constitute an allotment fixed for that handler within the meaning of subsection (5) of section 608a of this title.

(H) providing a method for fixing the size, capacity, weight, dimensions, or pack of the container, or containers, which may be used in the packaging, transportation, sale, shipment, or handling of any fresh or dried fruits, vegetables, or tree nuts: *Provided, however*, That no action taken hereunder shall conflict with the Standard Containers Act of 1916 (15 U.S.C. 251-256) and the Standard Containers Act of 1928 (15 U.S.C. 257-257i);

(I) establishing or providing for the establishment of production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order: *Provided*, That with respect to orders applicable to almonds, filberts (otherwise known as hazelnuts), California-grown peaches, cherries, papayas, carrots, citrus fruits,

onions, Tokay grapes, pears, dates, plums, nectarines, celery, sweet corn, limes, olives, pecans, eggs, avocados, apples, raisins, walnuts, tomatoes, caneberries (including raspberries, blackberries, and loganberries), Florida grown strawberries, or cranberries, such projects may provide for any form of marketing promotion including paid advertising and with respect to almonds, filberts (otherwise known as hazelnuts), raisins, walnuts, olives, Florida Indian River grapefruit, and cranberries may provide for crediting the pro rata expense assessment obligations of a handler with all or any portion of his direct expenditures for such marketing promotion including paid advertising as may be authorized by the order and when the handling of any commodity for canning or freezing is regulated, then any such projects may also deal with the commodity or its products in canned or frozen form: *Provided further*, That the inclusion in a Federal marketing order of provisions for research and marketing promotion, including paid advertising, shall not be deemed to preclude, preempt or supersede any such provisions in any State program covering the same commodity.

(J) In the case of pears for canning or freezing, any order for a production area encompassing territory within two or more States or portions thereof shall provide that the grade, size, quality, maturity, and inspection regulation under the order applicable to pears grown within any such State or portion thereof may be recommended to the Secretary by the agency established to administer the order only if a majority of the representatives from that State on such agency concur in the recommendation each year.

(7) Terms common to all orders

In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

(B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size, or quality thereof shall be sold by the handlers thereof only at prices filed by such handlers in the manner provided in such order.

(C) Providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their powers and duties, which shall include only the powers:

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

No person acting as a member of an agency established pursuant to this paragraph shall be deemed to be acting in an official capacity, within the meaning of section 610(g) of this title, unless such person receives compensation for his personal services from funds of the United States. There shall be included in the membership of any agency selected to administer a marketing order applicable to grapefruit for canning or freezing one or more representatives of processors of the commodity specified in such order.

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5), (6), and (7) of this section and necessary to effectuate the other provisions of such order.

(8) Orders with marketing agreement

Except as provided in subsection (9) of this section, no order issued pursuant to this section shall become effective until the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of not less than 50 per centum of the volume of the commodity or product thereof covered by such order which is produced or marketed within the production or marketing area defined in such order have signed a marketing agreement, entered into pursuant to section 608b of this title, which regulates the handling of such commodity or product in the same manner as such order, except that as to citrus fruits produced in any area producing what is known as

California citrus fruits no order issued pursuant to this subsection shall become effective until the handlers of not less than 80 per centum of the volume of such commodity or product thereof covered by such order have signed such a marketing agreement: *Provided*, That no order issued pursuant to this subsection shall be effective unless the Secretary of Agriculture determines that the issuance of such order is approved or favored:

(A) By at least two-thirds of the producers who (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers), during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(B) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

(9) Orders with or without marketing agreement

Any order issued pursuant to this section shall become effective in the event that, notwithstanding the refusal or failure of handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) covered by such order which is produced or marketed within the production or marketing area defined in such order to sign a marketing agreement relating to such commodity or product thereof, on which a hearing has been held, the Secretary of Agriculture determines:

(A) That the refusal or failure to sign a marketing agreement (upon which a hearing has been held) by the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) specified therein which is produced or marketed within the production or marketing area specified therein tends to prevent the effectuation of the declared policy of this chapter with respect to such commodity or product, and

(B) That the issuance of such order is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy, and is approved or favored:

(i) By at least two-thirds of the producers (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers) who, during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(ii) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

(10) Manner of regulation and applicability

No order shall be issued under this section unless it regulates the handling of the commodity or product covered thereby in the same manner as, and is made applicable only to persons in the respective classes of

industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held. No order shall be issued under this chapter prohibiting, regulating, or restricting the advertising of any commodity or product covered thereby, nor shall any marketing agreement contain any provision prohibiting, regulating, or restricting the advertising of any commodity, or product covered by such marketing agreement.

(11) Regional application

(A) No order shall be issued under this section which is applicable to all production areas or marketing areas, or both, of any commodity or product thereof unless the Secretary finds that the issuance of several orders applicable to the respective regional production areas or regional marketing areas, or both, as the case may be, of the commodity or product would not effectively carry out the declared policy of this chapter.

(B) Except in the case of milk and its products, orders issued under this section shall be limited in their application to the smallest regional production areas or regional marketing areas, or both, as the case may be, which the Secretary finds practicable, consistently with carrying out such declared policy.

(C) All orders issued under this section which are applicable to the same commodity or product thereof shall, so far as practicable, prescribe such different terms, applicable to different production areas and marketing areas, as the Secretary finds necessary to give due recognition to the differences in

production and marketing of such commodity or product in such areas.

(D) In the case of milk and its products, no county or other political subdivision of the State of Nevada shall be within the marketing area definition of any order issued under this section.

(12) Cooperative association representation

Whenever, pursuant to the provisions of this section, the Secretary is required to determine the approval or disapproval of producers with respect to the issuance of any order, or any term or condition thereof, or the termination thereof, the Secretary shall consider the approval or disapproval by any cooperative association of producers, bona fide engaged in marketing the commodity or product thereof covered by such order, or in rendering services for or advancing the interests of the producers of such commodity, as the approval or disapproval of the producers who are members of, stockholders in, or under contract with, such cooperative association of producers.

(13) Retailer and producer exemption

(A) No order issued under subsection (9) of this section shall be applicable to any person who sells agricultural commodities or products thereof at retail in his capacity as such retailer, except to a retailer in his capacity as a retailer of milk and its products.

(B) No order issued under this chapter shall be applicable to any producer in his capacity as a producer.

(14) Violation of order

(A) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order shall, on conviction, be fined not less than $50 or more than $5,000 for each such violation, and each day during which such violation continues shall be deemed a separate violation. If the court finds that a petition pursuant to subsection (15) of this section was filed and prosecuted by the defendant in good faith and not for delay, no penalty shall be imposed under this subsection for such violations as occurred between the date upon which the defendant's petition was filed with the Secretary, and the date upon which notice of the Secretary's ruling thereon was given to the defendant in accordance with regulations prescribed pursuant to subsection (15) of this section.

(B) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order may be assessed a civil penalty by the Secretary not exceeding $1,000 for each such violation. Each day during which such violation continues shall be deemed a separate violation, except that if the Secretary finds that a petition pursuant to paragraph (15) was filed and prosecuted by the handler in good faith and not for delay, no civil penalty may be assessed under this paragraph

for such violations as occurred between the date on which the handler's petition was filed with the Secretary, and the date on which notice of the Secretary's ruling thereon was given to the handler in accordance with regulations prescribed pursuant to paragraph (15). The Secretary may issue an order assessing a civil penalty under this paragraph only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable in the district courts of the United States in any district in which the handler subject to the order is an inhabitant, or has the handler's principal place of business. The validity of such order may not be reviewed in an action to collect such civil penalty.

(15) Petition by handler and review

(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are hereby

vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

(16) Termination of orders and marketing agreements

(A) (i) Except as provided in clause (ii), the Secretary of Agriculture shall, whenever he finds that any order issued under this section, or any provision thereof, obstructs or does not tend to effectuate the declared policy of this chapter, terminate or suspend the operation of such order or such provision thereof.

(ii) The Secretary may not terminate any order issued under this section for a commodity for which there is no Federal program established to support the price of such commodity unless the Secretary gives notice of, and a statement of the reasons relied upon by the Secretary for, the proposed termination of such order to the Committee on Agriculture, Nutrition, and Forestry of the Senate and the Committee on Agriculture of the House of Representatives not later than 60 days before the date such order will be terminated.

(B) The Secretary shall terminate any marketing agreement entered into under section 608b of this title, or order issued under this section, at the end of the then current marketing period for such commodity, specified in such marketing agreement or order, whenever he finds that such termination is favored by a majority of the producers who, during a representative period determined by the Secretary, have been engaged in the production for market of the commodity specified in such marketing agreement or order, within the production area specified in such marketing agreement or order, or who, during such representative period, have been engaged in the production of such commodity for sale within the marketing area specified in such marketing agreement or order: *Provided*, That such majority have, during such representative period, produced for market more than 50 per centum of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or have, during such representative period, produced more than 50 per centum of the volume of such commodity sold in the

marketing area specified in such marketing agreement or order, but such termination shall be effective only if announced on or before such date (prior to the end of the then current marketing period) as may be specified in such marketing agreement or order.

(C) Except as otherwise provided in this subsection with respect to the termination of an order issued under this section, the termination or suspension of any order or amendment thereto or provision thereof, shall not be considered an order within the meaning of this section.

(17) Provisions applicable to amendments

(A) Applicability to amendments

The provisions of this section and section 608d of this title applicable to orders shall be applicable to amendments to orders.

(B) Supplemental rules of practice

(i) In general

Not later than 60 days after the date of enactment of this subparagraph, the Secretary shall issue, using informal rulemaking, supplemental rules of practice to define guidelines and timeframes for the rulemaking process relating to amendments to orders.

(ii) Issues

At a minimum, the supplemental rules of practice shall establish--

(I) proposal submission requirements;

(II) pre-hearing information session specifications;

(III) written testimony and data request requirements;

(IV) public participation timeframes; and

(V) electronic document submission standards.

(iii) Effective date

The supplemental rules of practice shall take effect not later than 120 days after the date of enactment of this subparagraph, as determined by the Secretary.

(C) Hearing timeframes

(i) In general

Not more than 30 days after the receipt of a proposal for an amendment hearing regarding a milk marketing order, the Secretary shall--

(I) issue a notice providing an action plan and expected timeframes for completion

of the hearing not more than 120 days after the date of the issuance of the notice;

(II) (aa) issue a request for additional information to be used by the Secretary in making a determination regarding the proposal; and

(bb) if the additional information is not provided to the Secretary within the timeframe requested by the Secretary, issue a denial of the request; or

(III) issue a denial of the request.

(ii) Requirement

A post-hearing brief may be filed under this paragraph not later than 60 days after the date of an amendment hearing regarding a milk marketing order.

(iii) Recommended decisions

A recommended decision on a proposed amendment to an order shall be issued not later than 90 days after the deadline for the submission of post-hearing briefs.

(iv) Final decisions

A final decision on a proposed amendment to an order shall be issued not later than 60 days after the deadline for submission of comments and exceptions to the recommended decision issued under clause (iii).

(D) Industry assessments

If the Secretary determines it is necessary to improve or expedite rulemaking under this subsection, the Secretary may impose an assessment on the affected industry to supplement appropriated funds for the procurement of service providers, such as court reporters.

(E) Use of informal rulemaking

The Secretary may use rulemaking under section 553 of Title 5 to amend orders, other than provisions of orders that directly affect milk prices.

(F) Avoiding duplication

The Secretary shall not be required to hold a hearing on any amendment proposed to be made to a milk marketing order in response to an application for a hearing on the proposed amendment if--

(i) the application requesting the hearing is received by the Secretary not later than 90 days after the date on which the Secretary has announced the decision on a previously proposed amendment to that order; and

(ii) the 2 proposed amendments are essentially the same, as determined by the Secretary.

(G) Monthly feed and fuel costs for make allowances

As part of any hearing to adjust make allowances under marketing orders commencing prior to September 30, 2012, the Secretary shall--

(i) determine the average monthly prices of feed and fuel incurred by dairy producers in the relevant marketing area;

(ii) consider the most recent monthly feed and fuel price data available; and

(iii) consider those prices in determining whether or not to adjust make allowances.

* * *

(19) Producer referendum

For the purpose of ascertaining whether the issuance of an order is approved or favored by producers or processors, as required under the applicable provisions of this chapter, the Secretary may conduct a referendum among producers or processors and in the case of an order other than an amendatory order shall do so. The requirements of approval or favor under any such provision shall be held to be complied with if, of the total number of producers or processors, or the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of the percentage required under such provision. The terms and conditions of the proposed order shall be described by the Secretary in the ballot used in the conduct of the referendum. The nature, content, or extent of such description shall

not be a basis for attacking the legality of the order or any action relating thereto. Nothing in this subsection shall be construed as limiting representation by cooperative associations as provided in subsection (12) of this section. For the purpose of ascertaining whether the issuance of an order applicable to pears for canning or freezing is approved or favored by producers as required under the applicable provisions of this chapter, the Secretary shall conduct a referendum among producers in each State in which pears for canning or freezing are proposed to be included within the provisions of such marketing order and the requirements of approval or favor under any such provisions applicable to pears for canning or freezing shall be held to be complied with if, of the total number of producers, or the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of 66 2/3 per centum except that in the event that pear producers in any State fail to approve or favor the issuance of any such marketing order, it shall not be made effective in such State.

7 C.F.R. § 989.1 - Secretary

Secretary means the Secretary of Agriculture of the United States or any officer or employee of the United States Department of Agriculture to whom authority has heretofore been delegated or to whom authority may hereafter be delegated, to act in his stead.

7 C.F.R. § 989.2 - Act

Act means Public Act No. 10, 73d Congress, as amended, and as re-enacted and amended by the Agricultural Marketing Act of 1937, as amended (sections 1-19, 48 Stat. 31, as amended, 7. U.S.C. 601-674)

7 C.F.R. § 989.3 - Person

Person means an individual, partnership, corporation, association, or any other business unit.

7 C.F.R. § 989.4 - Area

Area means the State of California.

7 C.F.R. § 989.5 - Raisins

Raisins means grapes of any variety grown in the area, from which a significant part of the natural moisture has been removed by sun-drying or artificial dehydration, either prior to or after such grapes have been removed from the vines. Removal of a significant part of the natural moisture means removal which has progressed to the point where the

grape skin develops wrinkles characteristic of wrinkles in fully formed raisins.

* * *

7 C.F.R. § 989.7 - Golden Seedless Raisins

Golden Seedless raisins means raisins, the production of which includes soda dipping, sulfuring, and artificial dehydration.

7 C.F.R. § 989.8 - Natural Condition Raisins

Natural condition raisins means raisins the production of which includes sun-drying or artificial dehydration but which have not been further processed to a point where they meet any of the conditions for "packed raisins", as defined in § 989.9.

7 C.F.R. § 989.9 - Packed Raisins

Packed raisins means raisins which have been stemmed, graded, sorted, cleaned, or seeded, and placed in any container customarily used in the marketing of raisins or in any container suitable or usable for such marketing. Raisins in the process of being packed or raisins which are partially packed shall be subject to the same requirements as packed raisins.

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7 C.F.R. § 989.10 - Varietal Types

Varietal types means raisins generally recognized as possessing characteristics differing from other raisins in a degree sufficient to make necessary or desirable separate identification and classification. Varietal types are the following: Natural (sun-dried) Seedless, Dipped Seedless, Golden Seedless, Muscats (including other raisins with seeds), Sultana, Zante Currant, Monukka, and Oleate and Related Seedless: *Provided*, That the Committee may, subject to approval of the Secretary, change this list of varietal types.

7 C.F.R. § 989.11 - Producer

Producer means any person engaged in a proprietary capacity in the production of grapes which are sun-dried or dehydrated by artificial means until they become raisins: *Provided*, That a "producer" shall include any person whose production unit has qualified for diversion under a diversion program announced by the Committee.

7 C.F.R. § 989.12 - Dehydrator

Dehydrator means any person who produces raisins by dehydrating grapes by artificial means.

7 C.F.R. § 989.13 - Processor

Processor means any person who receives or acquires natural condition raisins, off-grade raisins, other failing raisins or raisin residual material and uses them or it within the area, with or without other ingredients, in the production of a product other than raisins, for market or distribution.

7 C.F.R. § 989.14 - Packer

Packer means any person who, within the area, stems, sorts, cleans, or seeds raisins, grades stemmed raisins, or packages raisins for market as raisins: *Provided*, That:

(a) No producer with respect to the raisins produced by him, and no group of producers with respect to raisins produced by the producers comprising the group, and not otherwise a packer, shall be deemed a packer if he or it sorts or cleans (with or without water) such raisins in their unstemmed form;

(b) Any dehydrator shall be deemed to be a packer, with respect to raisins dehydrated by him, only if he stems, cleans with water subsequent to such dehydration, seeds or packages them for market as raisin;

(c) The committee may, with the approval of the Secretary restrict the exceptions as to permitted cleaning if necessary to cause delivery of sound raisins; and

(d) No person shall be deemed a packer by reason of the fact he repackages for market (with or without additional preparation) packed raisins which, in the

hands of a previous holder, have been inspected and certified as meeting the applicable minimum grade standards for packed raisins.

7 C.F.R. § 989.15 - Handler

Handler means: (a) Any processor or packer; (b) any person who places, ships, or continues natural condition raisins in the current of commerce from within the area to any point outside thereof; (c) any person who delivers off-grade raisins, other failing raisins or raisin residual material to other than a packer or other than into any eligible non-normal outlet; or (d) any person who blends raisins: *Provided*, That blending shall not cause a person not otherwise a handler to be a handler on account of such blending if he is either: (1) A producer who, in his capacity as a producer, blends raisins entirely of his own production in the course of his usual and customary practices of preparing raisins for delivery to processors, packers, or dehydrators; (2) a person who blends raisins after they have been placed in trade channels by a packer with other such raisins in trade channels; or (3) a dehydrator who, in his capacity as a dehydrator, blends raisins entirely of his own manufacture.

7 C.F.R. § 989.16 - Blend

Blend means to mix or commingle raisins.

7 C.F.R. § 989.17 - Acquire

Acquire means to have or obtain physical possession of raisins by a handler at his packing or processing plant or at any other established receiving station operated by him: *Provided*, That a handler shall not be deemed to acquire any raisins (including raisins produced or dehydrated by him) while:

(a) He stores them for another person or as handler-produced tonnage in compliance with the provisions of §§ 989.58 and 989.70; (b) He reconditions them, or;

(c) He has them in his possession for the purpose of inspection; and *Provided further*, That the term shall apply only to the handler who first acquires the raisins.

7 C.F.R. § 989.18 - Committee

Committee means the Raisin Administrative Committee established under § 989.26.

* * *

7 C.F.R. § 989.20 - Ton

Ton means a short ton of 2,000 pounds.

7 C.F.R. § 989.21 - Crop Year

Crop year means the 12–month period beginning with August 1 of any year and ending with July 31 of the following year.

7 C.F.R. § 989.22 - District

District means any one of the geographical areas referred to in § 989.26, and designated in the rules and regulations.

7 C.F.R. § 989.23 - File

File means transmit or deliver to the Secretary or committee, as the case may be, and such act shall be deemed to have been accomplished at the time:

(a) Of actual receipt by the Secretary or committee in the event of personal delivery;

(b) Of receipt at the office of the telegraph company, in case submission is by telegram; or

(c) Shown by the postmark, in case submission is by mail.

7 C.F.R. § 989.24 - Standard raisins, off-grade raisins, other failing raisins, and raisin residual material

(a) Standard raisins means raisins which meet the then effective minimum grade and condition standards for natural condition raisins.

(b) Offgrade raisins means raisins which do not meet the then effective minimum grade and condition standards for natural condition raisins: *Provided*, That raisins which are certified as off-grade raisins shall continue to be such until successfully reconditioned or become "other failing raisins."

(c) Other failing raisins means any raisins received or acquired by a handler, either as standard raisins

or off-grade raisins, which are processed to a point where they qualify as packed raisins but fail to meet the applicable minimum grade standards for packed raisins.

(d) Raisin residual material means defective raisins, stemmer waste, sweepings, and other residue accumulated by a handler from reconditioning raisins or from processing standard raisins and other failing raisins.

7 C.F.R. § 989.25 Part and subpart

Part means the order regulating the handling of raisins produced from grapes grown in California, and all rules, regulations, and supplementary orders issued thereunder. This order regulating the handling of raisins produced from grapes grown in California shall be a subpart of such part.

7 C.F.R. § 989.26 - Establishment and membership

A Raisin Administrative Committee is hereby established consisting of 47 members of whom 35 shall represent producers, 10 shall represent handlers, 1 shall represent the cooperative bargaining association(s) and 1 shall be a public member. The producer members shall be selected as follows:

(a) Producer members representing the cooperative marketing association(s) shall be members of such association(s) engaged in the handling of raisins, each of which acquired not less than 10 percent of the total raisin acquisitions during the preceding crop year, and those members shall be equal to the

product, rounded to the nearest whole number, obtained by multiplying 35 by the ratio the cooperative marketing association(s) raisin acquisitions are to the acquisitions of all handlers during the preceding crop year.

(b) Producer members representing cooperative bargaining association(s) shall be members of such associations, and the number of those members shall be equal to the product, rounded to the nearest whole number, obtained by multiplying 35 by the ratio the raisins acquired by handlers from bargaining association members are to the total acquisitions of all handlers during the preceding crop year.

(c) All other producer members who shall not be members of a cooperative bargaining association(s), cooperative marketing association(s) engaged in the handling of raisins which acquired 10 percent or more of the total acquisitions during the preceding crop year, nor sold for cash to cooperative marketing association(s), shall represent all producers not defined in paragraph (a) or (b) of this section and shall be selected in the number and, when appropriate, for the districts as designated in the rules and regulations.

(d) The handler members shall be divided into two groups and include the following:

(1) Handler members shall be selected from and represent cooperative marketing association(s) engaged in the handling of raisins each of which acquired not less than 10 percent of the total raisin acquisitions during the preceding crop year, and the number of those members shall be equal to the product, rounded to the nearest whole number,

obtained by multiplying 10 by the ratio of the cooperative marketing association(s) raisin acquisitions are to the total acquisitions of all handlers during the preceding crop year.

(2) The remaining handler members shall be selected from and represent all other handlers, which would include all independent handlers and small cooperative marketing association(s) who acquired less than 10 percent of the total raisin acquisitions during the preceding crop year. Handler nominees for this group shall be nominated by all handlers in the group in a manner determined by the Committee, with the approval of the Secretary, and specified in the rules and regulations.

(e) The "cooperative" bargaining association'(s) member shall be selected from the cooperative bargaining association(s). The public member shall be nominated by the Committee and selected by the Secretary as public member.

(f) For each member of the Committee there shall be an alternate member who shall have the same qualifications as the member for whom he is an alternate.

* * *

7 C.F.R. § 989.35 - Powers

The committee shall have the following powers:

(a) To administer the terms and provisions of this part;

(b) To make rules and regulations to effectuate the terms and provisions of this part;

(c) To recommend to the Secretary amendments to this part; and

(d) To receive, investigate, and report to the Secretary complaints of violations of this part.

7 C.F.R. § 989.36 - Duties

The committee shall have, among others, the following duties:

(a) To act as intermediary between the Secretary and any producer, packer, dehydrator, processor or cooperative bargaining association;

(b) To investigate compliance and to use means available to it to prevent violations of this part;

(c) To keep minutes, books, and other records, which shall clearly reflect all of its acts and transactions, and such minutes, books, and other records shall be subject to examination by the Secretary at any time;

(d) To investigate and assemble data on the production, handling and market conditions with respect to raisins;

(e) To submit to the Secretary such available information with respect to raisins and grapes as he may request, and such other information as the committee may deem desirable and pertinent;

(f) To select from among its members a chairman and other officers, and to adopt such rules and regulations for the conduct of its business as it may deem advisable;

(g) To appoint or employ such other persons as it may deem necessary, and to determine the salaries and define the duties of each such person;

(h) To cause the books of the committee to be audited by certified public accountants at least once each year, or at such other times as the committee may deem necessary or as the Secretary may request, and the report of each such audit shall show, among other things, the receipts and expenditures of funds, and at least two copies of each such audit shall be submitted to the Secretary;

(i) To prepare quarterly statements of its financial operations and make such statements, together with the minutes of its meetings, available at the office of the committee for inspection by producers, handlers and dehydrators;

(j) To give reasonable advance notice of the times, places, and purposes of its meetings by mail or other appropriate means to each member and alternate member and such notice shall be given as widespread publicity as is practicable;

(k) To conduct meetings for the purpose of making nominations for membership on the committee and the certifying of nominations made for such purposes to the Secretary;

(l) To establish, with the approval of the Secretary, such rules and procedures relative to administration of this subpart as may be consistent with the provisions contained in this subpart and as may be necessary to accomplish the purposes of the act and the efficient administration of this subpart.

* * *

7 C.F.R. § 989.38 - Procedure

The Committee shall meet at the call of the chairman, or vice-chairman when acting as chairman, or at the call of any three members. All decisions of the Committee reached shall be by majority vote of the members present. All votes shall be cast in person and a quorum must be present. The presence of 25 members shall be required to constitute a quorum. The Committee shall give to the Secretary the same notice of meetings of the Committee as it gives to its members.

* * *

7 C.F.R. § 989.53 - Research and development

(a) General. The Committee, with the approval of the Secretary, may establish or provide for the establishment of projects involving marketing research and development and marketing promotion including paid advertising, designed to assist, improve, or promote the marketing, distribution, and consumption of raisins in domestic and foreign markets. These projects may include, but need not be limited to those designed to:

(1) Improve through research the accuracy of raisin production estimates;

(2) Improve through research the preparation for market, sanitation, quality, condition, storability, processing, or packaging of raisins;

(3) Ascertain through research the factors affecting acceptance of raisins by manufacturers or consumers;

(4) Promote the marketing, distribution, or consumption of raisins in domestic and foreign markets by collecting data thereon, consulting with members of the trade, and making the information available to producers, handlers, and exporters; and

(5) Promote the marketing, distribution, or consumption of raisins in foreign markets through the use of merchandising programs.

The expense of any such project relating solely to free tonnage raisins shall be paid from funds collected pursuant to § 989.80. The expense of any such project relating solely to reserve tonnage raisins shall be paid from the sale proceeds of such raisins. If any such project encompasses both free tonnage and reserve tonnage raisins, such as one which is designed to promote the consumption in export outlets of raisins generally on a long-term basis, the expense of the project may be allocated between the assessment fund and the pool fund.

(b) Creditable expenditures. The Committee, with the approval of the Secretary, may provide for crediting all or any portion of a handler's direct expenditures for marketing promotion, including paid advertising, that promotes the sale of raisins, raisin products, or their use. No handler shall receive credit for any allowable direct expenditures that would exceed the total of his assessment obligation which is attributable to that portion of his assessment designated for marketing promotion including paid advertising.

(c) Criteria. Before any project involving marketing promotion, including paid advertising, and the crediting of the handler's pro rata expense

assessment obligation of handlers is undertaken pursuant to this section, the Secretary after recommendation by the Committee, shall approve appropriate criteria to effectively regulate such activity.

7 C.F.R. § 989.54 - Marketing policy

<Text of subsection (a) suspended in Part June 9, 1989.>

(a) Trade demand. On or before August 15 of each crop year, the Committee shall hold a meeting to review shipment data, inventory data, and other matters relating to the quantity of raisins of all varietal types. For any varietal type for which a free tonnage percentage may be recommended, the Committee shall compute a trade demand. The trade demand shall be 90 percent of the prior crop year's shipments (converted to a natural condition weight) of free tonnage and reserve tonnage sold for free use for that varietal type, into all market outlets, adjusted by the carryin on August 1 of the current crop year and the desirable carryout for the varietal type at the end of that crop year. If the prior year's shipments were limited because of crop conditions, the Committee may select the shipments of one of the three years preceding the prior crop year. The desirable carryout shall be increased from 45,000 to 60,000 tons for Natural (sun-dried) Seedless raisins at a rate of 5,000 tons per year for three crop years following the effective date of this amended subpart. The desirable carryout for Dipped Seedless raisins shall be 1,500 tons, and for Oleate and Related Seedless raisins, 1,500 tons. The trade demand computed by the Committee shall be announced by

the Committee in accordance with paragraph (h) of this section.

(b) Preliminary percentages. On or before October 5 of each crop year (except that the Committee may extend this date not more than five business days if warranted by a late crop), the Committee shall estimate the production of any varietal type of raisins for which it has computed a trade demand. If the Committee determines that volume regulation is desirable during the crop year for that varietal type, it shall compute and announce preliminary free and reserve percentages for that varietal type: *Provided*, That such production estimate shall include by varietal type the raisins handlers are expected to acquire from producers and the total tonnage of raisins diverted under a raisin diversion program. The Committee shall compute a preliminary free percentage to release 85 percent of the computed trade demand, if it determines that a field price has been established for that varietal type, or 65 percent of the trade demand if no field price has been established. The preliminary free percentage shall be computed by multiplying the trade demand by either 85 percent or 65 percent (as the case may be) and dividing the product by the estimated production of that varietal type and rounding the resulting percentage to the nearest full percent. The difference between 100 percent and the preliminary free percentage shall be the preliminary reserve percentage.

(c) Interim percentages. Prior to February 15, the Committee may modify the preliminary free and reserve percentages to release less than the trade demand.

(d) Final percentages. No later than February 15, the Committee shall recommend to the Secretary, final free and reserve percentages which will tend to release the full trade demand for any varietal type for which preliminary or interim percentages have been computed and announced. The difference between any final free percentage designated by the Secretary and 100 percent shall be the final reserve percentage. With its recommendation, the committee shall report on its consideration of the factors in paragraph (e) of this section.

(e) Factors. When computing preliminary and interim percentages, or determining final percentages for recommendation to the Secretary, the Committee shall give consideration to the following factors:

(1) The estimated tonnage held by producers, handlers, and for the account of the Committee at the beginning of the crop year;

(2) The expected general quality and any modifications of the minimum grade standards;

(3) The estimated tonnage of standard and off-grade raisins which will be produced;

(4) If different than the computed trade demand, the estimated trade demand for raisins in free tonnage outlets;

(5) If not estimated as provided in paragraph (a) of this section, an estimated desirable carryout at the end of the crop year for free tonnage and, if applicable, for reserve tonnage;

(6) The estimated market requirements for raisins outside free tonnage outlets, considering the estimated world raisin supply and demand situation;

(7) Current prices being received and the probable general level of prices to be received for raisins by producers and handlers;

(8) The trend and level of consumer income;

(9) Any prohibition of trade practices, pursuant to § 989.62 intended for the crop year; and

(10) Any other pertinent factors bearing on the marketing of raisins including the estimated supply of and demand for other varietal types and regulations applicable thereto.

(f) Modification. In the event the Committee subsequently deems it advisable to modify its marketing policy on any crop, because of national emergency, crop failure, or other major change in economic conditions, it shall hold a meeting for that purpose, and file a report thereof with the Secretary within 5 days (exclusive of Saturdays, Sundays, and holidays) after the holding of such meeting, which report shall show such modification and the basis therefor.

<Text of subsection (g) suspended in Part effective Sept. 29, 1997.>

(g) Reserve tonnage to sell as free tonnage. On or before November 15 of the crop year, the Committee shall make two simultaneous offers of reserve tonnage to handlers to sell as free tonnage for each varietal type for which preliminary percentages have been computed and announced. One offer shall consist of a quantity equal to 10 percent of the prior

year's (or the alternative year selected by the Committee pursuant to paragraph (a) of this section) shipments of free tonnage and reserve tonnage sold for free use into all market outlets to equate the current year's supply with the prior year's shipments. This offer shall be allocated to handlers on the basis of their prior year's acquisitions. The second offer, to provide for market expansion, shall consist of a quantity equal to 10 percent of the prior year's (or the alternative year selected by the Committee pursuant to paragraph (a) of this section) shipments of free tonnage and reserve tonnage sold for free use. This offer shall be allocated to handlers on the basis of their prior year's shipments of free tonnage and reserve tonnage sold for free use. Each offer shall be open to handlers not more than five business days, and subsequently, two offers of any tonnage unsold in the original offers open not more than two business days each, may be made. The reoffer tonnage shall be allocated to handlers who purchase 100 percent of their allocation in preceding offers, and shall be on the basis of the quantity each handler purchased, as a percentage of the total quantity purchased by all handlers eligible to participate. At the close of the second reoffer, any remaining tonnage may be offered to handlers who purchased all of their allocations from previous offers on a first-come first-served basis and such offer shall be open to handlers for one business day. Any handler who had no shipments or acquisitions of raisins during the prior crop year will be allocated raisins under these offers on the basis of his acquisition (up to the time the original offer is made) of raisins in the current crop year. If field prices are not established, the offer shall be made not more

than fifteen days following such establishment. The price of reserve tonnage raisins offered to handlers to sell as free tonnage, pursuant to this paragraph, shall be the established field price for free tonnage raisins of that varietal type, plus 3 percent of the established field price, plus the estimated costs incurred by the Committee for equity holders.

(h) Publicity. The Committee shall promptly give reasonable publicity to producers, dehydrators, handlers, and the cooperative bargaining association(s) of each meeting to consider a marketing policy or any modification thereof, and each such meeting shall be open to them. Similar publicity shall be given to producers, dehydrators, handlers, and the cooperative bargaining association(s) of each marketing policy report or modification thereof, filed with the Secretary and of the Secretary's action thereon. Copies of all marketing policy reports shall be maintained in the office of the Committee, where they shall be made available for examination by any producer, dehydrator, handler, or cooperative bargaining association representative. The Committee shall notify handlers, dehydrators and the cooperative bargaining association(s), and give reasonable publicity to producers of its computation of the trade demand, preliminary percentages, and interim percentages and shall notify handlers, dehydrators, and the cooperative bargaining association(s) of the Secretary's action on percentages by registered or certified mail.

7 C.F.R. § 989.55 - Regulation by the Secretary

Whenever the Secretary finds, from the recommendation and supporting information supplied by the Committee or from other available information, that to designate final free and reserve percentages for any varietal type of standard raisins acquired by handlers, during the crop year will tend to effectuate the declared policy of the Act, the Secretary shall designate such percentages. In the event the Secretary finds that suspension or termination of any percentages computed by the Committee or designated by the Secretary tend to effectuate the declared policy of the Act, the Secretary shall suspend or terminate such percentages.

7 C.F.R. § 989.56 - Raisin Diversion Program

(a) Announcement of program. On or before November 30 of each crop year, the committee shall hold a meeting to review production data, supply data, demand data, including anticipated demand to all potential market outlets, desirable carryout inventory, and other matters relating to the quantity of raisins of all varietal types. When the committee determines that raisins exist in the reserve pool in excess of projected market needs for any varietal type, it may announce the amount of such tonnage eligible for diversion during the subsequent crop year. At the same time, the committee shall determine and announce to producers, handlers, and the cooperative bargaining association(s) the allowable harvest cost to be applicable to such diversion tonnage. A production cap of 2.75 tons of

raisins per acre shall be established for any production unit approved for participation in a diversion program. The committee, with the approval of the Secretary, may recommend, at the same time that the diversion tonnage for that season is announced, a change in the production cap for that season's diversion program of less than 2.75 tons per acre for any production unit approved for the diversion program.

(b) Voluntary diversion. No producer shall be required to participate in any raisin diversion program.

(c) Issuance of diversion certificates. After the committee announces a raisin diversion program, any producer may divert grapes of the producer's own production and receive from the committee a diversion certificate in accordance with the applicable rules and regulations. Such certificates may only be submitted by producers to handlers in accordance with applicable rules and regulations. Diversion certificates issued by the committee shall apply to a specific production unit and shall be equal to the creditable fruit weight, not to exceed the production cap established pursuant to paragraph (a) of this section, of such raisins produced on such unit during the prior crop year or the last prior crop year eligible for such diversion: *Provided*, That in the case of a production unit, or partial production unit, removed from production through vine removal or other means established by the committee, the committee may issue a diversion certificate in an amount greater than the creditable fruit weight of the raisins produced therein or the production cap applicable.

(d) Redemption of diversion certificates. Handlers may redeem diversion certificates for reserve pool raisins. To redeem a certificate, a handler must present the diversion certificate to the Committee and pay the Committee an amount equal to the harvest cost it has established, plus an amount equal to the payment for receiving, storing, fumigating, handling, and inspecting reserve tonnage raisins specified in § 989.401 for the entire tonnage represented on the certificate. Upon receipt of the diversion certificate, the Committee shall note on the certificate that it is cancelled.

(e) Implementation of the program. The Committee shall establish, with the approval of the Secretary, such rules and regulations as may be necessary for the implementation and operation of a raisin diversion program.

* * *

7 C.F.R. § 989.58 - Natural condition raisins

(a) Regulation. No handler shall acquire or receive natural condition raisins which fail to meet such minimum grade and condition standards as the committee may establish, with the approval of the Secretary, in applicable rules and regulations: *Provided*, That a handler may receive raisins for inspection, may receive off-grade raisins for reconditioning and may receive or acquire off-grade raisins for use in eligible non-normal outlets: *And provided further*, That a handler may acquire natural condition raisins which exceed the tolerance established for maturity under a weight dockage

system established pursuant to rules and regulations recommended by the committee and approved by the Secretary. Nothing contained in this paragraph shall apply to the acquisition or receipt of natural condition raisins of a particular varietal type for which minimum grade and condition standards are not applicable or then in effect pursuant to this part.

(b) Changes in minimum grade and condition standards for natural condition raisins. The committee may recommend to the Secretary changes in the minimum grade and condition standards for natural condition raisins of any varietal type and may recommend to the Secretary that minimum grade and condition standards for any varietal type be added to or deleted. The committee shall submit with its recommendation all data and information upon which it acted in making its recommendation, and such other information as the Secretary may request. The Secretary shall approve any such change if he finds, upon the basis of data submitted to him by the committee or from other pertinent information available to him, that to do so would tend to effectuate the declared policy of the act.

(c) Publicity and notice. The committee shall give prompt and reasonable publicity to producer, dehydrators, and handlers of each recommendation submitted by it to the Secretary and of each regulation issued by the Secretary. Notice of such regulation shall be given to all handlers by registered or certified mail.

(d) Inspection and certification.

(1) Each handler shall cause an inspection and certification to be made of all natural condition

raisins acquired or received by him, except with respect to: (i) An interplant or interhandler transfer of offgrade raisins as described in paragraph (e)(2) of this section, unless such inspection and certification are required by rules and procedures made effective pursuant to this amended subpart; (ii) an interplant or interhandler transfer of free tonnage raisins as described in § 989.59(e); (iii) raisins received from a dehydrator which have been previously inspected pursuant to paragraph (d) (2) of this section; (iv) any raisins for which minimum grade and condition standards are not then in effect; (v) raisins received from a cooperative bargaining association which have been inspected and are in compliance with requirements established pursuant to paragraph (d)(3) of this section; and (vi) any raisins, if permitted in accordance with such rules and procedures as the committee may establish with the approval of the Secretary, acquired or received for disposition in eligible nonnormal outlets. The handler shall be reimbursed by the committee for inspection costs incurred by him and applicable to pool tonnage held for the account of the committee. Except as otherwise provided in this section, prior to blending raisins, acquiring raisins, storing raisins, reconditioning raisins, or acquiring raisins which have been reconditioned, each handler shall obtain an inspection certification showing whether or not the raisins meet the applicable grade and condition standards: *Provided*, That the initial inspection for infestation shall not be required if the raisins are fumigated in accordance with such rules and procedures as the committee shall establish with the approval of the Secretary. The handler shall submit or cause to be submitted to the committee a copy of

such certification, together with such other documents or records as the committee may require. Such certification shall be issued by inspectors of the Processed Products Standardization and Inspection Branch of the U.S. Department of Agriculture, unless the committee determines, and the Secretary concurs in such determination, that inspection by another agency would improve the administration of this amended subpart. The committee may require that raisins held on memorandum receipt be reinspected and certified as a condition for their acquisition by a handler.

(2) The committee may, in accordance with rules and procedures established with the approval of the Secretary, authorize handlers to receive or acquire natural condition raisins which have been produced by any dehydrator by dehydrating grapes by artificial means and have been inspected and certified on his premises. In the event there shall have been compliance with committee requirements, any handler who receives or acquires such inspected and certificated raisins shall be deemed to have satisfied the requirements contained in paragraph (d)(1) of this section with respect to inspection and certification of natural condition raisins received or acquired by him.

(3) The committee may, in accordance with rules and the procedures established with the approval of the Secretary, authorize handlers to receive or acquire without further inspection and certification, natural condition raisins, standard or offgrade, which have been inspected, certified and held, in compliance with committee requirements, at a

receiving station of a cooperative bargaining association.

(e) Off-grade raisins.

(1) Any natural condition raisins tendered to a handler which fail to meet the applicable minimum grade and condition standards may: (i) Be received or acquired by the handler for disposition, without further inspection, in eligible non-normal outlets; (ii) be returned unstemmed to the person tendering the raisins; or (iii) be received by the handler for reconditioning. Off-grade raisins received by a handler under any one of the three described categories may be changed to any other of the categories under such rules and procedures as the committee, with the approval of the Secretary, shall establish. No handler shall ship or otherwise dispose of off-grade raisins which he does not return to the tenderer, transfer to another handler as provided in paragraph (e)(2) of this section, or recondition so that they at least meet the minimum standards prescribed in or pursuant to this amended subpart, except into eligible non-normal outlets.

(2) Off-grade raisins may be transferred from the plant of the handler where received to another plant of his or to that of another handler within the State of California under such rules and procedures as the committee, with the approval of the Secretary, shall establish to safeguard the objectives of this part.

(3) Each handler shall, while holding any off-grade raisins, store them separate and apart from other raisins and the off-grade raisins shall be stored in accordance with disposition and reconditioning categories. The committee with the approval of the

Secretary may prescribe rules and procedures for the storage of the raisins.

(4) If the handler is to acquire the raisins after they are reconditioned, his obligation with respect to such raisins shall be based on the weight of the raisins (if stemmed, adjusted to natural condition weight) after they have been reconditioned. If, after such reconditioning, such raisins meet the minimum standards but are no longer natural condition raisins, any handler who acquires such raisins shall meet his reserve tonnage obligations from natural condition standard raisins acquired by him.

(5) The committee shall establish, with the approval of the Secretary, such additional rules and procedures as may be necessary to insure adequate control of off-grade raisins, including, but not limited to, the reconditioning of off-grade raisins, the disposition and use of unsuccessfully reconditioned raisins, and the disposition and use of residual matter from reconditioning operations.

(f) Blending. No handler shall blend raisins except:

(1) Incidental to reconditioning raisins as permitted under rules and procedures established by the committee, with the approval of the Secretary;

(2) blending standard raisins with standard raisins; or

(3) blending raisins which meet the minimum grade standards for packed raisins with other raisins which meet such standards.

7 C.F.R. § 989.59 - Regulation of the handling of raisins subsequent to the acquisition by handlers

(a) Regulation. Unless otherwise provided in this part, no handler shall: (1) Ship or otherwise make final disposition of natural condition raisins unless they at least meet the effective and applicable minimum grade and condition standards for natural condition raisins; or (2) ship or otherwise make final disposition of packed raisins unless they at least meet such minimum grade standards established by the committee, with the approval of the Secretary, in applicable rules and regulations or as later changed or prescribed pursuant to the provisions of paragraph (b) of this section: *Provided*, That nothing contained in this paragraph shall prohibit the shipment or final disposition of any raisins of a particular varietal type for which minimum standards are not applicable or then in effect pursuant to this part. *And provided further*, That a handler may grind raisins, which do not meet the minimum grade standards for packed raisins because of mechanical damage or sugaring, into a raisin paste.

(b) The committee may recommend changes in the minimum grade standards for packed raisins of any varietal type and may recommend to the Secretary that minimum grade standards for any varietal type be added or deleted. The committee shall submit with its recommendation all data and information upon which it acted in making its recommendation, and such other information as the Secretary may request. The Secretary shall approve any such

change if he finds, upon the basis of data submitted to him by the committee or from other pertinent information available to him, that to do so would tend to effectuate the declared policy of the act.

(c) Publicity and notice. The committee shall give prompt and reasonable notice to producers, dehydrators, handlers, and the cooperative bargaining association(s) of each recommendation submitted by it to the Secretary and of each regulation issued by the Secretary. Notice of such regulation shall be given to all handlers of record by registered or certified mail.

(d) Inspection and certification. Unless otherwise provided in this section, each handler shall, at his own expense, before shipping or otherwise making final disposition of raisins, cause and inspection to be made of such raisins to determine whether they meet the then applicable minimum grade and condition standards for natural condition raisins or the then applicable minimum grade standards for packed raisins. Such handler shall obtain a certificate that such raisins meet the aforementioned applicable minimum standards and shall submit or cause to be submitted to the committee a copy of such certificate together with such other documents or records as the committee may require. The certificate shall be issued by the Processed Products Standardization and Inspection Branch of the United States Department of Agriculture, unless the committee determines, and the Secretary concurs in such determination, that inspection by another agency will improve the administration of this amended subpart. Any certificate issued pursuant to this paragraph shall be valid only for such period of time

as the committee may specify, with the approval of the Secretary, in appropriate rules and regulations.

(e) Inter-plant and inter-handler transfers. Any handler may transfer from his plant to his own or another handler's plant within the State of California any free tonnage raisins without having had such raisins inspected as provided in paragraph (d) of this section. The transferring handler shall transmit promptly to the committee a report of such transfer, except that transfers between plants owned or operated by the same handler need not be reported. Before shipping or otherwise making final disposition of such raisins, the receiving handler shall comply with the requirements of this section.

(f) Disposition of offgrade raisins, other failing raisins, and raisin residual material in eligible nonnormal outlets. Any offgrade raisins, except those returned unstemmed to the tenderer or successfully reconditioned, and any raisin residual material which may be received or acquired by a handler or accumulated by a handler from reconditioning raisins or from processing standard raisins and other failing raisins, shall be disposed of or marketed by the handler, without further inspection, in eligible nonnormal outlets: *Provided*, That no packer shall be precluded from recovering raisins from such accumulations or acquisitions: *Provided further*, That whenever the Secretary concludes, on the basis of a recommendation of the committee, that to specify one or more nonnormal outlets as ineligible for any class of such receipts, acquisitions, or accumulations will tend to effectuate the declared policy of the act, he shall specify such ineligible outlets and prohibit the shipment thereto or final

disposition therein of such class by handlers as well as the receipt and use thereof by processors: *And provided further*, That no processor who is a distiller shall be precluded from receiving or using for distillation (1) the standard raisins which subsequently fail to meet the said applicable standards, (2) the raisin residual material accumulated from processing standard raisins, or (3) the raisin residual material referable to the standard raisin equivalent recovered in reconditioning; and any handler may ship such raisins and raisin residual material to such processor. The Committee shall establish, with the approval of the Secretary, such rules and procedures as may be necessary to insure adequate control over the off-grade raisins, other failing raisins, and raisin residual material subject to this paragraph. Such rules may include a requirement that the disposition and use of all or any class of off-grade raisins, other failing raisins, or raisin residual material be confined to the area. The provisions of this paragraph are not intended to excuse any failure to comply with all applicable food and sanitary rules and regulations of city, county, State, Federal, or other agencies having jurisdiction.

(g) Exemption of experimental and specialty packs. The committee may establish, with the approval of the Secretary, rules and procedures providing for the exemption of raisins in experimental and specialty packs from one or more of the requirements of the minimum grade standards of this section, together with the inspection and certification requirements if applicable.

7 C.F.R. § 989.60 - Exemption

(a) Notwithstanding any other provisions of this amended subpart, the committee may establish, with the approval of the Secretary, such rules and procedures as may be necessary to permit the acquisition and disposition of any off-grade or reserve pool raisins, free from any or all regulations, for uses in non-normal outlets.

(b) The committee may establish, with the approval of the Secretary, such rules and procedures as may be necessary to exempt from any or all regulations raisins produced in southern California (i.e., the counties of Riverside, Imperial, San Bernardino, Ventura, Orange, Los Angeles, and San Diego) and disposed of for distillation, livestock feed, or by export in natural condition to Mexico.

(c) The committee may designate such raisins as it deems appropriate for production, processing, and marketing research and development. The period of such designation shall be for not more than five years unless extended by the committee. The volume which may be acquired by all handlers shall not exceed 500 natural condition tons annually for each designated project, unless increased by the Secretary upon a recommendation of the committee. Such designated raisins may be acquired and disposed of free from those regulations specified by the committee. In any crop year, when the total industry acquisitions of the designated raisins exceed 500 natural condition tons or a larger quantity approved by the Secretary upon a recommendation of the committee, the exemption shall not apply.

7 C.F.R. § 989.61 - Above parity situations

The provisions of this part relating to minimum grade and condition standards and inspection requirements, within the meaning of section 2(3) of the act, and any other provisions pertaining to the administration and enforcement of the order, shall continue in effect irrespective of whether the estimated season average price to producers for raisins is in excess of the parity level specified in section 2(1) of the act.

7 C.F.R. § 989.62 - Authorization for prohibition of trade practices

Whenever the Secretary finds, upon recommendation of the committee or other information, that continuance of certain practices in trade channels would tend to interfere with the achieving of the objectives of this part, he may prohibit handlers from using such practices, for any crop year or portion thereof, in selling raisins in containers exceeding four pounds net weight. The prohibited practices may include:

(a) Any provision within or added to a sales contract, or action or agreement outside such contract, whereby the handler is obligated to reflect declines in market prices of raisins by charging the buyer a subsequent market price in lieu of the sales price specified in the contract.

(b) Any agreement in an undertaking to hold raisins in reserve for possible future delivery to a buyer, or action or agreement outside such undertaking, whereby the handler is obligated to not reflect

increases in market prices by charging the buyer a price specified in the agreement.

Prior to any such practices being prohibited in any crop year, the committee shall recommend, for the approval of the Secretary, such rules and procedures and such record keeping requirements as are necessary to administer these prohibitions and obtain compliance therewith.

* * *

7 C.F.R. § 989.65 - Free and reserve tonnage

The standard raisins acquired by handlers which are free tonnage, and any reserve tonnage purchased for free use, may be disposed of by him in any marketing channel, subject to the applicable provisions of this part. A handler's free tonnage of a varietal type of raisin shall be either the free percentage of the standard raisins of the varietal type acquired by him or all of the standard raisins of the varietal type acquired by him if no free percentage is established by the Committee or designated by the Secretary for that varietal type. A handler's reserve tonnage of a varietal type shall be the reserve percentage of the standard raisins of that varietal type acquired by him.

7 C.F.R. § 989.66 - Reserve tonnage generally

(a) The standard raisins acquired by a handler which are designated as reserve tonnage and reserve tonnage transferred to a handler by the committee shall be held by him for the account of the committee and subject to the applicable restrictions of this part.

(b) (1) Each handler shall hold in storage all reserve tonnage acquired by him and all reserve tonnage transferred to him by the committee until he has been relieved of such responsibility by the committee either by delivery to the committee or otherwise. Such handler shall store such reserve tonnage raisins in natural condition without addition of moisture and in such manner as will maintain the raisins in the same condition as when he acquired them, except for normal and natural deterioration and shrinkage, and except for loss through fire, acts of God or other conditions beyond the handler's control.

(2) Reserve tonnage acquired by a handler or transferred to a handler by the committee shall be stored separate and apart from other raisins to such extent and identified in such manner as the committee shall specify in its rules and procedures with the approval of the Secretary.

(3) Each handler may, under the direction and supervision of the committee, substitute for any reserve tonnage raisins a like quantity of standard raisins of the same varietal type and of the same or more recent year's production. Each such handler shall give the committee reasonable advance notice of his intention to substitute, the exact location of the raisins for which substitution is to be made, and arrange with the committee a mutually satisfactory time for the substitution.

(4) The committee may, after giving reasonable notice, require a handler to deliver to it, or to anyone designated by it, at such handler's warehouse or at such other place as the raisins may be stored,

part or all of the reserve tonnage raisins held by such handler. Reserve tonnage raisins delivered by any handler to the committee, or to any person designated by it, in the form of natural condition raisins shall in the aggregate be not more than 2 percent less than the average maturity level of all raisins such handler acquired during the applicable crop year. The committee may require that such delivery consist of natural condition raisins, or it may arrange for such delivery to consist of packed raisins.

(c) Each handler shall, at all times, hold in his possession or under his control reserve tonnage referable to his acquisitions of standard raisins and reserve tonnage transferred to him by the committee, less any quantity of such reserve tonnage released to him by a change of percentages, delivered by him pursuant to instructions of the committee or sold to him by the committee.

(d) Reserve tonnage raisins delivered by any handler to the committee, or to any person designated by it, whether in the form of natural condition raisins or packed raisins shall meet the applicable minimum grade or grade and condition standards, except for normal and natural deterioration. The committee shall have the authority to require, in its discretion and at its expense, such reinspection and certification of reserve pool tonnage raisins as it may deem necessary.

(e) In the event the committee offers to handlers reserve tonnage raisins for contract packing or for sale in export, as provided in § 989.67, each handler shall be given the opportunity to pack or purchase his share of each offer.

(f) Handlers shall be compensated for receiving, storing, fumigating, handling, and inspection of that tonnage of reserve raisins determined by the reserve percentage of a crop year and held by them for the account of the committee, in accordance with a schedule of payments established by the committee and approved by the Secretary. A box rental shall be paid by the committee to producers or handlers for boxes used in storing reserve tonnage raisins beyond the crop year of acquisition in accordance with a rental schedule established by the committee and approved by the Secretary. The handler compensation shall be reviewed annually and shall be paid, as to the amount determined to be earned and unpaid, as soon as practicable after the end of the second quarter of the crop year and quarterly thereafter. Any handler may request the committee, by registered or certified mail, at any time after June 1 of a crop year to remove or relocate reserve tonnage raisins of the current crop year which remain in his possession. At any time during a crop year, a handler may request removal or relocation of reserve tonnage of a prior crop year. In each instance, he may request that the committee provide the necessary containers for any such removal or relocation. When so requested as to current crop year raisins, the committee shall make the removal or relocation, the availability of containers, storage space and time of request permitting, ~~by~~ by September 15 of the subsequent crop year, and as to raisins of the prior crop year, within 30 days, supplying the necessary containers if so requested. If the committee removes or relocates reserve raisins of the current crop year pursuant to a handler's request, and such raisins are released to him by September 15 of the subsequent

crop year, the handler shall reimburse the committee for any costs incurred by it in such removal or relocation. If any handler requests removal or relocation of reserve raisins, the committee shall immediately give notice thereof to the Secretary.

(g) The committee shall have the authority, in its discretion, to obtain loans, nonrecourse or otherwise, on any part of the reserve tonnage not subject to release as desirable free tonnage and to pledge or hypothecate the raisins on which such loans are obtained as security therefor: *Provided*, That in every such case, there shall be included in the loan agreement a provision to the effect that, in case the lender obtains possession or control of such raisins, he will dispose of them in such a manner as will not tend to defeat the objectives of this amended subpart. The net proceeds of any such loan shall be distributed by the committee pursuant to paragraph (h) of this section.

(h) The net proceeds from the disposition of reserve tonnage raisins of any varietal type shall be distributed by the committee to the respective producers, or their successor in interest thereto, on the basis of the volume of their respective contributions to the reserve tonnage of such varietal type. Distribution of the proceeds in connection with the reserve tonnage contributed by a nonprofit cooperative marketing association which has authority to market the raisins of its members and to allocate the proceeds therefrom to such members shall be made to such association. Advance or progress payments may be made by the committee, in conformity with the provisions of this paragraph, as sufficient funds become available.

7 C.F.R. § 989.67 - Disposal of reserve raisins

(a) At the time the committee meets to consider free and reserve percentages for a crop year, the committee shall consider the marketing of reserve tonnage raisins for the subsequent 12–month period. The committee shall dispose of all reserve tonnage in such manner as to achieve, as nearly as may be practicable, maximum disposal of such raisins by the time reserve tonnage raisins from the subsequent crop year are available. Any reserve tonnage raisins held unsold by the committee on May 1 of the subsequent crop year shall be physically disposed of promptly in any available outlet not competitive with normal market channels for free tonnage raisins or sales of new crop reserve tonnage raisins in export: *Provided*, That, whenever the Secretary finds, based upon a recommendation of the committee, or on the basis of information otherwise available to him that because of national emergency, crop failure, an insufficient supply of reserve tonnage raisins for export, or other change of economic or marketing conditions, retention of reserve tonnage raisins carried over is warranted, the foregoing requirements as to disposal shall not apply and such raisins may be disposed of in any outlet recommended by the committee and approved by the Secretary.

(b) Reserve tonnage raisins shall be disposed of by the committee:

(1) By sale to handlers for sale in specified outlets or for resale to exporters for sale in export outlets;

(2) By direct sale to any agency of the U.S. Government for noncompetitive use;

(3) By direct sale to foreign government agencies or foreign importers in any country not listed pursuant to paragraph (c) of this section or where the procurement of raisins is so regulated as to preclude purchases from domestic handlers;

(4) By gift; and

(5) By any other means consistent with the provisions of this section, and in outlets noncompetitive with those for free tonnage raisins.

(c) The committee shall sell reserve raisins to handlers for export sale to countries on a list established by the Secretary, on the basis of the recommendation of the committee or from other available information. The list of countries shall be reviewed by the committee annually when it reviews matters relating to the free tonnage, and shall recommend any changes in the list to the Secretary for approval. No country may be removed from the list for the purpose of permitting direct sale by the committee unless a finding is made by the committee and approved by the Secretary, that such removal and subsequent direct sale by the committee shall not lead to disruption of sale of reserve tonnage raisins by handlers in other countries on the list, and that although handlers have been able to offer reserve tonnage raisins at competitive prices to the country to be so removed, there remains an unfilled demand in such country which has not been supplied by handlers and which could be supplied by the committee at the same prices by means of direct sale.

(d) (1) Reserve tonnage raisins shall be sold to handlers at prices and in a manner intended to maximum producer returns and achieve maximum

disposition of such raisins by the time reserve tonnage raisins from the subsequent crop year are available. The committee may pay the cost of transporting reserve tonnage from one handler to another and in the event a handler has more than one plant, the committee may pay the cost of transporting reserve tonnage to the handler's plant of its choice. In each offer or reoffer of reserve tonnage raisins for export, the committee may include a quantity of raisins not to exceed 2 percent of the total tonnage offered in such offer or reoffer, which it may sell to handlers whose regular allocation provides insufficient tonnage to fill a containerized freight shipping container: *Provided*, That such sale may be made only when the remaining portion of a handler's regular allocation will fill at least 50 percent of such container and shall be made to a handler only one time in each offer or reoffer of reserve tonnage raisins. No offer or reoffer shall be made until 5 days (exclusive of Saturdays, Sundays, and holidays) have elapsed from the time it files with the Secretary complete information as to varietal type, quantity, and price involved in such offer or reoffer, and the Secretary may disapprove the offer or reoffer or any term thereof: *Provided*, That at any time prior to the expiration of the 5–day period, the offer or reoffer may be made to handlers upon the committee receiving from the Secretary notice that he does not disapprove the making of the offer or reoffer. Subject to the same conditions as are set forth in the preceding sentence with respect to the making of such offer or reoffer, the committee may withdraw an offer or reoffer to sell reserve tonnage raisins to handlers or may extend the offer or reoffer period but

not when such extension would deprive one or more handlers of an opportunity to purchase raisins.

(2) Except for the final offer of the reserve tonnage from a crop year, an offer of reserve tonnage raisins for export shall provide for a specific tonnage. Each handler's share of the reserve tonnage offered prior to November 1 of any crop year shall be determined as the same proportion of the quantity offered that the free tonnage raisins acquired by him during the preceding crop year is of the free tonnage raisins acquired by all handlers during the preceding crop year who remain handlers. If reserve tonnage raisins have been removed by the committee from a handler's premises pursuant to § 989.66(f), such handler's allocation of reserve pool offers subsequent to such removal and prior to November 1 of the following crop year shall be reduced by the percentage such removed reserve tonnage is of the total reserve tonnage acquired by such handler in the crop year. Subsequent to October 31, each handler's share shall be determined as the same proportion of the quantity offered that the free tonnage raisins acquired by the handler during the then current crop year is of the total free tonnage raisins acquired by all handlers during the then current crop year. With respect to any offer other than the initial offer, each handler's share of the total quantity offered as of that date (the then current offer plus all prior offers of that crop year) shall first be determined by the appropriate formula. His share of the current offer shall then be determined by subtracting from his share of the total quantity offered, the total of his share of prior offers from the beginning of the crop year. If any handler did not acquire raisins during the preceding crop

year, the basis for his share of any quantity of reserve tonnage raisins offered prior to November 1 shall be his acquisitions of free tonnage raisins during the then current crop year. The current free tonnage acquisitions of all such new handler shall, for the purposes of determining the shares of all handlers prior to November 1, be added to the total acquisitions of free tonnage raisins during the preceding crop year of all handlers in business at the time the offer is made.

(3) With respect to any offer of reserve tonnage for sale to handlers for resale in export, the committee may provide that any such tonnage unpurchased at the end of the share reservation period will be reoffered to handlers without regard to shares and that approval for handlers' applications for purchase may be made in the same order in which the applications are received by the committee. Such reoffer may be made by the committee at the time it makes a regular offer of reserve tonnage, at any time during the period a regular offer is in effect, or within a reasonable time after a regular offer has expired.

(4) The final offer of the reserve tonnage from a crop year may be offered to handlers without regard to shares and approval of handlers' applications for purchase may be made in the same order in which the applications are received by the committee.

(5) Whenever a handler's share or allocation pursuant to this paragraph is less than or exceeds his holdings of reserve tonnage by a minor quantity, the committee may adjust the handler's share or allocation so as to avoid the cost of the physical transfer. The maximum quantity by which a

handler's share or allocation may be so allocated shall be prescribed in rules and procedures which the committee shall establish with the approval of the Secretary.

(e) The committee may sell reserve tonnage raisins as provided in paragraph (b)(3) of this section only when such country is not included in the list of specified countries established pursuant to paragraph (c) of this section and may sell reserve tonnage raisins to foreign government agencies of foreign importers in any country removed from such list. No agreement to sell reserve tonnage raisins shall be entered into by the committee until 5 days (exclusive of Saturdays, Sundays, and holidays) have elapsed from the time it files with the Secretary complete information as to varietal type, quantity, price and foreign country involved in any such proposed sale, and the Secretary may disapprove such sale or any term thereof: *Provided*, That, at any time prior to the expiration of the 5–day period, the sale may be made upon the committee receiving from the Secretary notice that he does not disapprove the making of the sale.

(f) Whenever the committee concludes that the orderly disposition of reserve tonnage would be promoted by the committee replacing any portion or all of handlers' export shipments of free tonnage raisins, to other than free tonnage outlets, made prior to the committee's first offer to sell reserve tonnage, it may do so and may specify such requirements and conditions as are necessary to carry out the replacement consistent with the objectives of this amended subpart. The committee may establish a price for such replacement tonnage

which is higher, the same as, or lower than that for reserve tonnage in the first offer of the crop year. Any such replacement offer by the committee shall be governed by those provisions of paragraph (d)(1) of this section which prescribe prior action by the Secretary on committee offers to sell tonnage to handlers.

(g) (1) The committee may, subject to review by the Secretary, refuse to sell reserve tonnage raisins for export:

(i) To any handler who is in default on any previous purchase of reserve tonnage raisins from the committee;

(ii) To any handler currently not in compliance with the provisions of a sales agreement covering reserve tonnage raisins, executed by such handler with the committee; or

(iii) To any handler who signifies an intention to sell reserve tonnage to or through any person who has previously failed to complete a sale of reserve tonnage raisins to a foreign buyer and such raisins remain to be exported and remain unsold to any foreign buyer in an eligible export market.

(2) Handlers who are in default of timely payment under any purchase agreement are subject to an interest and late payment charge(s) recommended by the committee and approved by the Secretary on the delinquent amount that is owed the committee. The interest charge shall be the current prime rate plus 2 percent established by the bank in which the committee has its administrative assessment funds deposited, on the day the amount owed becomes delinquent; and further, that such rate of interest be

added to the bill monthly until the handler's delinquent amount owed plus applicable interest has been paid: *Provided*, That the committee, with the approval of the Secretary, may recommend changes in the rate of interest to another rate of interest. When the committee determines to change the rate of interest or a late payment charge is needed, and such change is approved by the Secretary, the committee shall announce the change in the rate of interest or the rate of late payment charge through a mailing by the committee to handlers.

(3) Appeals. If a determination is made by the committee that a handler has not complied with the provisions of this section and any actions allowed under this section are taken against the handler, such handler may request a hearing before an appeals subcommittee established by the committee. If the handler disagrees with the subcommittee's decisions, the handler may request the committee to review the subcommittee's decision. The committee may, subject to the approval of the Secretary, establish additional procedures concerning appeals.

(h) Each packer's share of an offer of reserve tonnage raisins for contract packing shall be determined as the same proportion that the reserve tonnage raisins acquired by him is of the reserve tonnage raisins acquired by all packers. In the event that any packer fails to contract for packing any or all of his share of any offer, the remaining portion thereof shall be reoffered by the committee to all packers who contracted for packing all of their respective shares, in proportion to their respective acquisitions: Provided, That, if such amount which packers fail to contract for packing does not exceed 250 tons, or if it

is necessary to deviate from the foregoing in order to meet terms and conditions of shipment, the committee may, in its discretion, allocate such reserve tonnage raisins among packers as it deems appropriate, but the shares of packers in subsequent offers or reoffers shall be adjusted accordingly.

(i) In the event the committee determines that the applicable procedures as specified in paragraphs (d) and (h) of this section will not provide an allocation for handlers which is suitable for a particular situation, the committee, with the approval of the Secretary, may establish such modifications of procedures, consistent with § 989.66(e), as will facilitate the disposition of reserve tonnage through the handlers.

<Text of subsection (j) suspended in Part effective Sept. 29, 1997.>

(j) The committee shall not sell reserve tonnage raisins of any varietal type to handlers to provide them with raisins to sell as free tonnage, other than as provided in § 989.54, unless it files with the Secretary complete information and receives from the Secretary notice that he does not disapprove of such sale and that because of: National emergency, crop failure; change of economic or marketing conditions; free tonnage shipments during the then current crop year—exceeding shipments of a comparable period of the prior crop year by more than 5 percent: *Provided*, That, such sale of reserve tonnage shall be limited to the quantity exceeding 105 percent of shipments for the first 10 months of the prior crop year; and/or an inadequate carryover, the free tonnage outlets cannot be reasonably well

supplied by the tonnage released to the industry as a whole by the committee's marketing policy for that varietal type. Any quantities of reserve raisins offered to handlers for free use, except as provided in § 989.54(g), may be offered to them on the basis of handler shipments or acquisitions in the same manner as in paragraph (d)(1) of this section. If offered on the basis of acquisitions, shares shall be determined pursuant to paragraph (d)(2) of this section. If offered on the basis of shipments, the same formula shall be used, except that shipments shall be used as the basis instead of acquisitions in computing handlers' shares. However, such raisins shall not be sold at a price below that which the committee concludes reflects the average price received by producers for free tonnage of the same varietal type purchased by handlers during the current crop year up to the time of any offer for sale of reserve tonnage by the committee, to which shall be added the costs to the equity holders incurred by the committee on account of receiving, inspecting, storing, fumigating, insuring, and holding of said raisins, and including costs of taxes and interest: *Provided*, That, where the outlook for the next crop year or other factors have caused a downward trend in the prices received by producers for free tonnage raisins or in the prices received by handlers for free tonnage packed raisins, reserve tonnage may be sold to handlers at the currently prevailing or the approximate computed field price for free tonnage raisins, as determined by the committee. The committee may sell reserve tonnage raisins of any varietal type to any handler to provide him with raisins to sell as free tonnage if such handler has lost all or part of his free tonnage because of fire or other

disaster beyond his control subject to the applicable provisions of this paragraph and in an amount equal to such tonnage so lost.

* * *

7 C.F.R. § 989.70 - Storage or raisins held on memorandum receipt and of packer-owned tonnage

All raisins stored by a handler for another person on memorandum or warehouse receipt, or raisins produced and stored by a handler, shall be stored separate and apart from other raisins and shall be clearly marked or tagged as raisins stored on memorandum or warehouse receipt or as raisins produced by the handler but not acquired by him in his capacity as a handler.

7 C.F.R. § 989.71 - Disposition of unsold reserve tonnage in above parity situations

In the event that the Secretary should find, during a crop year when reserve tonnage percentages have been designated and are in effect pursuant to this part, that the estimated season average price for raisins for that crop year will be in excess of the price level contemplated by the provisions of section 2(1) of the act, he shall issue an order providing for the orderly disposition of the unsold reserve tonnage then on hand, in such outlets, at such times, and in accordance with such terms and conditions, as he may determine to be appropriate in the circumstances. In determining the liquidation procedures and terms, the Secretary shall give

consideration to the data and recommendations, if any, which may be submitted by the committee.

* * *

7 C.F.R. § 989.73 - Reports

(a) Inventory reports. Each handler shall, upon request of the committee, file promptly with the committee a certified report, showing such information as the committee shall specify with respect to any raisins which were held by him on a date designated by the committee, which information as specified may include, but not be limited to:

(1) The quantity of any raisins so held, segregated as to varietal type, natural condition, packed, standard quality or off-grade quality; and

(2) The locations of the raisins.

(b) Acquisition reports. Each handler shall submit to the committee in accordance with such rules and procedures as are prescribed by the committee, with the approval of the Secretary, certified reports, for such periods as the committee may require, with respect to his acquisitions of each varietal type of raisins during the particular period covered by such report, which report shall include, but not be limited to: (1) The total quantity of standard raisins acquired; (2) the quantity of reserve tonnage referable to his acquisitions of standard raisins; (3) the locations of such reserve tonnages; (4) the total quantity of off-grade raisins acquired pursuant to § 989.58(e)(1)(i), and (5) cumulative totals of such acquisitions from the beginning of the then current crop year to and including the end of the period for

which the report is made. Upon written application made to the committee, a handler may be relieved of submitting such reports after completing his packing operations for the season. Upon request of the committee, each handler shall furnish to the committee, in such manner and at such times as it may require, the name and address of each person from whom he acquired raisins and the quantity of each varietal type of raisins acquired from each such person.

(c) Each handler shall file such reports of creditable promotion including paid advertising as recommended by the Committee and approved by the Secretary.

(d) Other reports. Upon the request of the committee, with the approval of the Secretary, each handler shall furnish to the committee such other information as may be necessary to enable it to exercise its powers and perform its duties under this amended part.

* * *

7 C.F.R. § 989.76 - Records

Each handler shall maintain such records of all raisins received, and of all raisins acquired, by him as prescribed by the committee. Such records shall include, but not be limited to, the quantity of raisins of each varietal type acquired from each person and the name and address of each such person, total acquisitions, total sales, and total other disposition of each varietal type which he handles, and each handler shall maintain such records for at least two

years after the termination of the crop year in which the transactions occurred. The Committee, with the approval of the Secretary, may prescribe rules and regulations to include under this section handler records that detail promotion and advertising activities which the Committee may need to perform its functions under § 989.53.

7 C.F.R. § 989.77 - Verification of reports and records

For the purpose of checking and verifying reports filed by handlers and records prescribed in or pursuant to this amended subpart, the committee, through its duly authorized representatives, shall have access to any handler's premises during regular business hours and shall be permitted at any such times to inspect such premises and any raisins held by such handler, and any and all records of the handler with respect to the holding or disposition of raisins by him and promotion and advertising activities conducted by handlers under § 989.53. Each handler shall furnish all labor and equipment necessary to make such inspections. Each handler shall store raisins in a manner which will facilitate inspection, and shall maintain storage records which will permit accurate identification of raisins held by him or theretofore disposed of. Insofar as is practicable and consistent with the carrying out of the provisions of this amended subpart, all data and information obtained or received through checking and verification of reports and records shall be treated as confidential information.

* * *

7 C.F.R. § 989.79 - Expenses

The committee is authorized to incur such expenses (other than those specified in § 989.82) as the Secretary finds are reasonable and likely to be incurred by it during each crop year, for the maintenance and functioning of the committee and for such purposes as he may, pursuant to this subpart, determine to be appropriate. The funds to cover such expenses shall be obtained levying assessments as provided in § 989.80. The committee shall file with the Secretary for each crop year a proposed budget of these expenses and a proposal as to the assessment rate to be fixed pursuant to § 989.80, together with a report thereon. Such filing shall be not later than October 5 of the crop year, but this date may be extended by the committee not more than 5 days if warranted by a late crop. Also it shall file at the same time a proposed budget of the expenses likely to be incurred during the crop year in connection with reserve raisins held for the account of the committee, exclusive of the receiving, storing, fumigating, and handling expenses which are covered by a schedule of payments to handlers effective pursuant to § 989.66(f) or any rules and procedures established by the committee, and exclusive of any expenses it may incur in connection with the disposition of such raisins and which are unknown at the time. The said report shall also cover this proposed budget.

7 C.F.R. § 989.80 - Assessments

(a) Each handler shall, with respect to free tonnage acquired by him, and any reserve tonnage released

or sold to him for use in free tonnage outlets, pay to the committee, upon demand, his pro rata share of the expenses (exclusive of expenses for receiving, fumigating, handling, holding or disposing of reserve pool tonnage) which the Secretary finds will be incurred, as aforesaid, by the committee during each crop year less any amounts credited pursuant to § 989.53. Such handler's pro rata share of such expenses shall be equal to the ratio between the total free tonnage acquired by such handler plus any reserve tonnage released or sold to him for use as free tonnage, during the applicable crop year and the total free tonnage acquired by all handlers plus all reserve tonnage released or sold to all handlers for use as free tonnage, during the same crop year: *Provided*, That (1) in computing the total free tonnage acquired by a particular handler, there shall be excluded all standard raisins (recovered by the reconditioning of offgrade raisins) acquired by the handler and which comprise the assessable portion of another handler pursuant to paragraph (b) of this section, and (2) the computation of the total free tonnage acquired by all handlers shall not be similarly reduced.

(b) Each handler who reconditions offgrade raisins but does not acquire the standard raisins recovered therefrom shall, with respect to his assessable portion of all such standard raisins, pay to the committee, upon demand, his pro rata share of the expenses which the Secretary finds will be incurred by the committee each crop year. Such handler's pro rata share of such expenses shall be equal to the ratio between the handler's assessable portion (which shall be a quantity equal to the free tonnage portions of such handler's standard raisins which are

acquired by some other handler or handlers) during the applicable crop year and the total free tonnage acquired by all handlers, plus all reserve tonnage released or sold to all handlers for use as free tonnage, during the same crop year.

(c) During any crop year or any portion of a crop year for which volume percentages are not effective for a varietal type, all standard raisins of that varietal type acquired by handlers during such period shall be free tonnage for purposes of levying assessments pursuant to this section. The Secretary shall fix the rate of assessment to be paid by all handlers on the basis of a specified rate per ton. At any time during or after a crop year, the Secretary may increase the rate of assessment to obtain sufficient funds to cover any later finding by the Secretary relative to the expenses of the committee. Each handler shall pay such additional assessment to the committee upon demand. In order to provide funds to carry out the functions of the committee, the committee may accept advance payments from any handler to be credited toward such assessments as may be levied pursuant to this section against such handler during the crop year. The payment of assessments for the maintenance and functioning of the committee, and for such purposes as the Secretary may pursuant to this subpart determine to be appropriate, may be required under this part throughout the period it is in effect, irrespective of whether particular provisions thereof are suspended or become inoperative.

(d) Each handler shall, with respect to administrative assessments not paid within 30 calendar days of the date of the Committee's invoice,

pay to the Committee interest on the unpaid assessment at the rate of the prime rate established by the bank in which the Committee has its administrative assessment funds deposited, on the day that the administrative assessment becomes delinquent plus 2 percent; and further, that such rate of interest be added to the bill monthly until the delinquent handler's assessment plus applicable interest has been paid: *Provided*, That the Committee may, with the approval of the Secretary, modify the interest rate applicable to delinquent handler's assessment through the establishment of applicable rules and regulations.

7 C.F.R. § 989.81 - Accounting

(a) If, at the end of the crop year, the assessments collected for such crop year exceed the expenses incurred with respect to such crop year, each handler's share of such excess shall be credited to him against, and may be used for, the operations of the following crop year, unless such handler demands payment thereof, in which case his share shall be paid to him.

(b) The committee may, with the approval of the Secretary, maintain in its own name or in the name of its members, a suit against any handler for the collection of such handler's pro rata share of the expenses.

7 C.F.R. § 989.82 - Expenses of reserve raisin operations

The committee is authorized to incur such expenses as are reasonable and are necessary in discharging its obligations, pursuant to this part, with respect to the receiving, fumigating, handling, holding, or disposing of any quantity of reserve pool raisins held for the account of the committee. The committee is authorized to pay any taxes assessed against raisins held by or for the account of the committee on March 1, or such assessment date as later changed and then in effect, in the reserve pool established pursuant to this subpart: *Provided*, That any equity holder may pay his taxes upon giving notice to the committee on or before May 1 of each year of his intention to do so. All pool expenses shall be deducted from the proceeds obtained by the committee from the sale or other disposal of such reserve raisins held for the account of the committee.

7 C.F.R. § 989.83 - Funds

All funds received by the committee pursuant to the provisions of this part, shall be used solely for the purposes authorized, and shall be accounted for in the manner provided, in this part. The Secretary may, at any time, require the committee and its members and alternate members to account for all receipts and disbursements.

7 C.F.R. § 989.84 - Disposition limitation

No handler shall dispose of free or reserve tonnage raisins, offgrade raisins, or other failing raisins, except in accordance with the provisions of this subpart or pursuant to regulations issued by the committee.

* * *

7 C.F.R. § 989.86 - Separability

If any provision of this amended subpart is declared invalid, or the applicability thereof to any person, circumstance, or thing is held invalid, the validity of the remainder of this amended subpart or the applicability thereof to any other person, circumstance, or thing shall not be affected thereby.

* * *

7 C.F.R. § 989.89 - Agents

The Secretary may, by a designation in writing, name any person, including any officer or employee of the United States Government, or name any bureau or division in the United States Department of Agriculture, to act as his agent or representative in connection with any of the provisions of this amended subpart.

* * *

7 C.F.R. § 989.91 - Suspension or termination

(a) The Secretary may, at any time, terminate the provisions of this amended subpart by giving at least one day's notice by means of a press release or in any other manner which he may determine.

(b) The Secretary shall terminate or suspend the operation of any or all of the provisions of this amended subpart, whenever he finds that such provisions do not tend to effectuate the declared policy of the act.

(c) The Secretary shall terminate the provisions of this amended subpart at the end of any crop year whenever he finds that such termination is favored by a majority of the producers who, during a representative period determined by the Secretary, have been engaged in the production for market of grapes used in the production of raisins in the State of California: *Provided*, That such majority have, during such representative period, produced for market more than 50 percent of the volume of such grapes produced for market within said State; but such termination shall be effective only if announced before July 31 of the then current crop year.

(d) The provisions of this amended subpart shall, in any event, terminate whenever the provisions of the act authorizing them cease to be in effect.

7 C.F.R. § 989.92 - Proceedings after termination

(a) Upon the termination of the provisions of this amended subpart, the members of the committee then functioning shall continue as joint trustees for

the purpose of liquidating the affairs of the committee, of all funds and property then in the possession or under the control of the committee, including claims for any funds unpaid or property not delivered at the time of such termination. Action by said trusteeship shall require the concurrence of a majority of the said trustees.

(b) Said trustees shall continue in such capacity until discharged by the Secretary; shall, from time to time, account for all receipts and disbursements and deliver all property on hand, together with all books and records of the committee and the joint trustees, to such person as the Secretary may direct; and shall, upon the request of the Secretary, execute such assignments or other instruments necessary or appropriate to vest in such person full title and right to all of the funds, property, and claims vested in the committee or the joint trustees pursuant to this subpart.

(c) Any person to whom funds, property or claims have been transferred or delivered by the committee or its members, pursuant to this section, shall be subject to the same obligations imposed upon the members of the said committee and upon said joint trustees.

7 C.F.R. § 989.93 - Effect of termination or amendment

Unless otherwise expressly provided by the Secretary, the termination of this amended subpart or any regulation issued pursuant to this amended subpart, or the issuance of any amendment to either thereof, shall not (a) affect or waive any right, duty,

obligation, or liability which shall have arisen or which may thereafter arise in connection with any provision of this amended subpart or any regulation issued under this amended subpart, (b) release or extinguish any violation of this amended subpart, or of any regulation issued under this amended subpart, or (c) affect or impair any rights or remedies of the Secretary or of any other person, with respect to any such violation.

7 C.F.R. § 989.94 - Amendments

Amendments to this amended subpart may be proposed from time to time, by any person or by the committee.

7 C.F.R. § 989.95 - Right of Secretary

The members of the committee (including alternates and successors) and any agent or employee appointed or employed by the committee, shall be subject to removal or suspension by the Secretary, in his discretion, at any time. Every decision, determination, or other act of the committee shall be subject to the continuing right of the Secretary to disapprove of the same at any time. Upon such disapproval, the disapproved action of the committee shall be deemed null and void.

* * *

7 C.F.R. § 989.166 - Reserve tonnage generally

(a) Set-aside obligations--

(1) Natural (sun-dried) Seedless. Handlers who acquire any lot of natural condition Natural (sun-dried) Seedless raisins which have been dipped in or sprayed with water, with or without chemicals, prior to or during the drying process, for purposes other than to expedite drying, or that have been produced from seedless varieties of grapes other than Thompson Seedless (i.e., Fiesta, Emerald Seedless, Perlette, Delight, and other similar grape varieties), or that have been treated with Oleate or similar drying agents, or such other Natural (sun-dried) Seedless raisins that have been produced using other cultural practices as recommended by the Committee with the approval of the Secretary, may set aside such raisins to satisfy their reserve pool obligation: *Provided,* That such raisins shall be identified by the Inspection Service affixing to one container on each pallet or to each bin in each lot, a prenumbered RAC control card (to be furnished by the Committee) which shall remain affixed until raisins are processed or disposed of as natural condition raisins: *and Provided further*, That such raisins shall not be delivered to the Committee or transferred to another handler without approval of the Committee or the receiving handler.

(2) Mixed varietal types. A handler who acquired any lot of natural condition raisins of mixed varietal types (commingled within their containers) shall meet the reserve tonnage setaside obligation for each varietal type contained in the mixed lot by setting aside raisins of each such varietal type which

have not been mixed or commingled with raisins of any other varietal type. The obligation as to each varietal type shall be computed according to the reserve percentage established by the Secretary, and the percentage of the varietal type contained in the mixed lot as shown by the incoming inspection certificate applicable thereto.

(b) Storage of reserve tonnage raisins--

(1) Time limits for setting aside pool tonnage. Handlers shall be allowed 3 calendar days (exclusive of Saturdays, Sundays, and holidays), after the preliminary or interim percentages have been computed and announced by the Committee, and after the publication in the Federal Register of the applicable final reserve percentages established for the crop year, or after any reserve tonnage raisins are acquired subsequent to the percentages being announced or established, to segregate and properly stack each varietal type of reserve tonnage raisins.

(2) Conditions. Each handler shall store reserve tonnage raisins in storage and under conditions which protect them from rain and which reasonably can be expected to maintain the raisins free of any biological or other infestation or contamination. Each handler shall, pursuant to § 989.66(b)(2), store each varietal type of reserve tonnage raisins held by him for the account of the Committee, separate and apart from all other raisins. Storage of such raisins shall be deemed "separate and apart" if the containers are so marked and placed as to be capable of ready and clear identification as to the category in which are held. Reserve tonnage raisins shall be stored in sweat

boxes, picking boxes, or other portable containers not exceeding one ton capacity:

(3) Substitution of free tonnage. A handler may, pursuant to § 989.66(b)(3), after giving the Committee reasonable advance notice in writing and under its direction and supervision, substitute standard raisins for reserve tonnage raisins.

(c) Remedy in the event of failure to deliver reserve tonnage raisins. A handler who fails to deliver to the Committee, upon request, any reserve tonnage raisins in the quantity and quality for which he has become obligated (after any shrinkage allowances which may then be in effect are applied and allowances for any deterioration due to conditions beyond his control are made) shall compensate the Committee for the amount of the loss resulting from his failure to so deliver. The amount of compensation for any shortage of tonnage shall be determined by multiplying the quantity of reserve raisins not delivered by the latest weighted average price per ton received by producers during the particular crop year for free tonnage raisins of the same varietal type or types, plus any charges already paid or credited to the handler and cost incurred by the Committee on account of the handler's failure to deliver. The weighted average price shall be determined from those sales made during the particular crop year up to the time such cash payment is requested by the Committee, or up to the end of the particular crop year, whichever date may be earlier. The amount which a handler shall compensate the Committee for any reserve raisins which have deteriorated so as to be off-grade in quality during storage for reasons within his control,

shall be the latest weighted average price received by the Committee for the applicable varietal type of reserve pool raisins, less the amount actually received by the Committee in the disposition of the deteriorated raisins delivered by the handler (or the salvage value of such raisins as determined by the Committee). Any amounts paid to the Committee in satisfaction of such deficiencies shall accrue to the earnings of the applicable reserve pool. The remedies provided in this paragraph shall be in addition to, and not exclusive of, any or all of the remedies or penalties prescribed in the act for failure on the part of the handler to comply with the applicable provisions of the act or of this part.

(d) Disposition of reserve tonnage raisins which become off-grade for causes beyond the handler's control. Any reserve tonnage raisins held by or for the account of the Committee which become off-grade for reasons beyond the handler's control shall, at the Committee's discretion, be reconditioned or disposed of by the Committee, or under the Committee's control, in eligible nonnormal outlets. Any monetary loss sustained in the reconditioning or disposition of such raisins, not covered by insurance carried by the Committee, shall be charged to the applicable reserve pool.

(e) Offers of reserve tonnage raisins to handlers for sale in export. Whenever the Committee offers reserve tonnage raisins to handlers for sale in export, it shall specify in addition to the normal contract terms and conditions, the total quantity, the price and period within which each handler will be permitted to purchase his share of the offer. Whenever a handler's share of an offer is less than,

or exceeds, his holding of reserve tonnage raisins by not more than 10 tons, the Committee may adjust his share so as to avoid the cost involved in the physical transfer of raisins. If, prior to the expiration of the offer period, a handler desires to obtain reserve tonnage in an amount greater than that represented by his share of the offer, he may negotiate with another handler for any unpurchased portion of the other handler's share of an outstanding offer. No such transaction shall be deemed to reduce the transferring handler's share or to increase the transferee handler's share so as to affect either handler's share privileges in subsequent offers. Transfers to implement such transactions between handlers shall be permitted by the Committee only upon receipt of written authorization, on a form furnished by the Committee, by the transferring handler. All limitations applicable to the transferred tonnage shall continue to apply. Such reserve tonnage raisins will be released by the Committee to the transferee handler upon submission of his completed application and full payment for such raisins, and such transferee handler shall be responsible to the Committee for all documentation required in connection with the transaction. All such transfers shall be made at the expense of the handlers concerned.

7 C.F.R. § 989.167 - Disposal of reserve raisins

(a) Offer of reserve tonnage raisins for use in noncompetitive outlets. Whenever the Committee proposes to offer to sell standard reserve tonnage raisins in noncompetitive outlets pursuant to § 989.67(a) and (b), it shall promptly file with the Secretary complete information with respect thereto and the basis therefor. The Secretary shall have the right to disapprove, within seven calendar days, the making of such an offer or sale or any term or conditions thereof.

(b) Determination of price of reserve tonnage sold for free tonnage use. Whenever, pursuant to § 989.67(j), the Committee concludes, with respect to any varietal type of raisins, that a downward trend in the price received by producers for free tonnage, or in the prices received by handlers for free tonnage packed raisins, makes it impracticable to sell reserve tonnage at the average price received by producers for free tonnage plus pooling costs, the Committee, subject to the requirements of § 99.67(j), may sell reserve tonnage raisins at the currently prevailing field price for free tonnage raisins of the same varietal type, unless such price is deemed to be unrepresentative of the current f.o.b. price of free tonnage packed raisins. In such an event, or if there is no current field price, the Committee shall make any offer of reserve tonnage at approximately the computed field price obtained by deducting from the current f.o.b. price for free tonnage packed raisins of the varietal type to be offered, the approximate recent packing and handling margin between such packed price and the field price for free tonnage

raisins. This paragraph (b) shall not be in effect from July 30, 1984, through July 31, 1986.

(c) Terms of reserve tonnage offers. Whenever the Committee offers reserve tonnage raisins to handlers for use in free tonnage outlets, the Committee shall, among other terms and conditions of the offer, specify (1) the period in which each handler shall be given the opportunity to purchase his share of the offer, and (2) the period in which each eligible handler shall be given an opportunity to purchase his respective share of any reoffer. In the event reserve pool raisins are transferred by the Committee, the purchasing handler shall promptly empty the raisins from the containers used in the transfer so that the Committee may return the containers and pallets used in the transfer to the handler from whom the raisins were transferred within 10 business days from the date of transfer. Any handler who refuses to permit the containers in which reserve pool raisins are stored to leave his premises, shall, at his expense, place such raisins in containers supplied by the Committee.

* * *

7 C.F.R. § 989.173 - Reports

(a) Inventory reports. Each handler shall submit to the Committee as of the close of business on July 31 of each crop year, and not later than the following August 6, an inventory report which shall show, with respect to each varietal type of raisins held by such handler: *Provided*, That, for the Other Seedless varietal type, handlers shall report the information

required in this paragraph separately for the different types of Other Seedless raisins:

(1) The quantity of free tonnage raisins, segregated as to locations where they are stored and whether they are natural condition or packed;

(2) The quantity of reserve tonnage raisins for the account of the Committee; and

(3) The quantity of off-grade raisins segregated as to those for reconditioning and those for disposition as such. Upon request by the Committee, each handler shall file at other times, and as of other dates, any of the said information which may reasonably be necessary for the determination or revision of marketing policy and which the Committee shall specify in its request.

(b) Reports of raisins received or acquired--

(1) General.

(i) Except as otherwise provided in paragraph (i) of this section, each handler shall submit to the Committee (on forms furnished by it) for each week (Sunday through Saturday or such other 7–day period for which the handler has submitted a proposal to and received approval from the Committee) and not later than the following Wednesday, the reports specified in paragraphs (b)(2), (3), (4), and (5) of this section.

(ii) For each report required to be submitted pursuant to this paragraph, the required information shall be shown separately for each varietal type: *Provided*, That, for the Other Seedless varietal type, the required information shall be shown separately for the different types of Other

Seedless raisins. With each report, other than that specified in paragraph (b)(4) of this section, the handler shall submit a copy of the door receipt, weight certificate or such other document approved by the Committee that accurately reflects the weight of each lot tendered, for each lot of raisins received or acquired by him during the reporting period and for each lot of raisins stored on memorandum or warehouse receipt which was returned to the tenderer during such period, which shall show the information to be contained on such receipts or weight certificates as specified in § 989.158(a)(3). At the time he submits the reports specified in paragraphs (b)(2) and (3) of this section to the Committee, each handler shall submit a copy of each such report to the Inspection Service.

(2) Acquisition of standard raisins. Each handler shall report:

(i) The total net weight of the standard raisins acquired during the reporting period, segregated when appropriate, as to free tonnage and reserve tonnage;

(ii) The location of the reserve tonnage raisins; and

(iii) The cumulative totals of such acquisitions (as so segregated) from the beginning of the then current crop year.

(3) Standard raisins received for memorandum storage. Each handler shall, with respect to all standard raisins held for memorandum receipt, storage, bailment, or warehousing (raisins received other than by acquisition or interhandler transfer), report:

(i) The net weight of such standard raisins held at the start of the reporting period;

(ii) The net weight of such standard raisins received during the reporting period;

(iii) The net weight of such standard raisins acquired during such period and included with the acquisitions required to be reported pursuant to paragraph (b)(2) of this section;

(iv) The net weight of such raisins returned during such period to the persons from whom they were received; and

(v) The net weight(s) and location(s) of such raisins held at the end of such period.

(4) Off-grade raisins returned to tenderers. Each handler shall report with respect to each lot of off-grade raisins which the handler returned during the reporting period to the tenderer pursuant to paragraph (1) of § 989.58(e):

(i) The inspection certificate number;

(ii) The net weight;

(iii) The name of the tenderer; and

(iv) The date the lot was returned to the tenderer.

(5) Off-grade raisins received for reconditioning or disposition in eligible nonfood channels. Each handler who is not a processor shall, with respect to all off-grade raisins received by the handler and retained by him for reconditioning or for disposition or use in eligible nonnormal outlets, report for each category received or reconditioned during the reporting period:

(i) The name of each tenderer;

(ii) The net weight of such raisins;

(iii) The locations where received;

(iv) The inspection certificate number covering each receipt;

(v) The name and address of each person to whom residual or off-grade lots were delivered for disposition, and the respective net weight delivered; and

(vi) The total net weight (according to location) of each category of off-grade raisins held by him at the end of the reporting period.

Each nonacquiring handler shall report also the weight of standard raisins recovered from reconditioning, their inspection certificate number(s) and the handler or other person to whom the standard raisins were delivered.

(6) Monthly report of raisins received or acquired by processors. Each processor who receives or acquires off-grade raisins, or who avail himself of the exemptions from the grade and inspection requirements provided in §§ 989.58, 989.59(f), and 989.160 and receives or acquires raisins or raisin residual material, shall submit to the Committee on or before the 7th day of each month a report of such raisins, raisin residual material, and off-grade raisins received or acquired during the preceding month. Each report shall show for each varietal type:

(i) The name and address of each handler, producer, or other person from whom such

raisins or raisin residual material was received or acquired; and

(ii) The net weight of such raisins and raisin residual material.

(7) Receipt of raisins produced from grapes grown outside the State of California. Each handler who receives raisins produced from grapes grown outside the State of California shall submit to the Committee, on an appropriate form provided by the Committee so that it is received by the Committee not later than the eighth day of each month, a report of the receipt of such raisins. This report shall include: The varietal type of raisins received; the net weight (pounds) of raisins received for the current month as well as a cumulative quantity from August 1; and the state or country where the raisins were produced. With each report, the handler shall submit a copy of the door receipt, weight certificate, or such other document as required by the Committee that includes, but is not limited to, the name of the tenderer (equity holder) from whom such raisins were received, the varietal type(s) of raisins, the net fruit weight, the number and type of containers in the lot, the date of delivery, and the address including State or country where such raisins were produced.

(c) Reports of disposition--

(1) Free tonnage raisins. Each month each handler who is not a processor shall furnish to the Committee, on an appropriate form provided by the Committee and so that it is received by the Committee not later than the seventh day of the month, a report showing the aggregate quantity of

each varietal type of free tonnage packed raisins and standard natural condition raisins which were shipped or otherwise disposed of by such handler during the preceding month (exclusive of transfers within the State of California between plants of any such handler and from such handler to other handlers): *Provided*, That, for the Other Seedless varietal type, handlers shall report such information for the different types of Other Seedless raisins. Such required information shall be segregated as to:

(i) Domestic outlets (exclusive of Federal Government purchases) according to the quantity shipped in consumer cartons, the quantity shipped in bags having a net weight content of four pounds or less, and the quantity shipped in bulk packs (including, but not limited to those in bags having a net weight content of more than four pounds);

(ii) Federal Government purchases;

(iii) Export outlets according to the quantity shipped in consumer cartons, the quantity shipped in bags having a net weight content of four pounds or less, and the quantity shipped in bulk packs (including, but not limited to, those in bags having a net weight content of more than four pounds);

(iv) Export outlets, by countries of destination; and

(v) Each of any other outlets in which the handler has made disposition of such raisins other than by any transfer which is excluded by the preceding sentence.

(2) Disposition by handlers (other than processors) of off-grade raisins, other failing raisins, and raisin residual material. Each handler who is not a processor shall submit to the Committee on or before the seventh day of each month a report of all shipments and other dispositions made during the preceding month of off-grade raisins, other failing raisins, and raisin residual material. Such report shall be submitted on a form furnished by the Committee and shall include the following information:

(i) Date of each shipment and other disposition;

(ii) Name and address of each buyer and receiver; and

(iii) Description and net weight of the raisins and raisin residual material in each shipment or other disposition.

(3) Disposition by handlers of raisins produced from grapes grown outside the State of California. Each handler who receives raisins produced from grapes grown outside the State of California shall submit to the Committee, on or before the eighth day of each month, a report, on the appropriate form provided by the Committee, of all shipments of such raisins made during the preceding month. This report shall include:

(i) The varietal type(s) of raisins shipped;

(ii) The net weight (pounds) of raisins shipped;

(iii) The destination (domestic, export, and other disposition such as distilleries, livestock feeders, or concentrate) of such shipments; and

(iv) The area of origin (state or country) of the raisins shipped.

(4) Disposition reports by processors. Each processor shall submit to the Committee, upon its request, such of the following information and for such period as the Committee shall specify;

(i) The quantity of raisins and raisin material sold or otherwise disposed of by processing operations, segregated as to the processing outlets and the kinds of raisins or raisin material which the Committee shall specify; and

(ii) The quantity of raisins or raisin material sold or otherwise disposed of by the processor, segregated as to specified outlets and kinds of raisins or raisin material.

(d) Reports of interhandler transfers--

(1) Free-tonnage. Any handler who transfers free-tonnage raisins to another handler within the State of California shall submit to the Committee not later than five calendar days following such transfer a report showing:

(i) The date of transfer;

(ii) The name(s) and address(es) of the handler or handlers and the locations of the plants;

(iii) The varietal type of raisin, with organically produced raisins as specified in paragraph (g) of this section separated out, net weight, and condition of the raisins transferred:

Provided, That, for the Other Seedless varietal type, handlers shall report such information for the different types of Other Seedless raisins;

(iv) If packed, the inspection certificate number in the event such raisins have been inspected prior to such transfer and a certificate issued. Two copies of such report shall be forwarded to the receiving handler at the time the report is submitted to the Committee, on one of which the receiving handler shall certify to the receipt of such raisins and submit it to the Committee within five calendar days after the raisins or the copies of such report have been received by him, whichever is later; and

(v) If packed, the transferring handler shall certify that such handler is transferring only acquired, free-tonnage raisins that meet all applicable marketing order requirements, including reporting, incoming inspection, assessments, and volume regulation.

(2) [Reserved by 73 FR 42259]

(e) Report of shipments of experimental or specialty packs under exemption. Each handler who obtains an exemption pursuant to § 989.59(g) for the shipment of experimental or specialty packs of raisins shall submit to the Committee on a copy of the approved application for exemption a report showing the quantity of raisins shipped or disposed of under such exemption. The handler shall submit the report promptly after the end of the crop year or after completion by him of all shipments of such exempted raisins, whichever is earlier.

(f) Reports pertaining to the release of reserve tonnage and marketing policy information. Upon request of the Committee, each handler shall submit to the Committee on forms furnished by it a report containing such of the following information for each specified varietal type of raisins as the Committee may request:

(1) The quantity of free tonnage raisins held by him in and outside California as of the date specified in the Committee's request, segregated by the portion sold and the portion not sold;

(2) The total quantity of raisins expected to be acquired by him subsequent to the date specified by the Committee, pursuant to purchase contracts with producers and dehydrators, which are in effect as of the date specified by the Committee;

(3) The weighted average price paid by him to producers and dehydrators for free tonnage raisins, natural condition basis, during the period specified by the Committee and the quantity of raisins for which such average was computed;

(4) The quantity of free tonnage raisins sold or sold and shipped (as to which category the Committee shall specify) by him during a period specified by the Committee, segregated to show the quantities sold or sold and shipped in:

(i) Domestic markets; and

(ii) Foreign markets, detailed by country; and

(5) The average weighted f.o.b. sales prices received from sales, during a period specified by the Committee, of raisins in 30 pound fibre cases in

domestic markets and the quantity of raisins for which such average prices were computed. Each such report shall be submitted not later than the end of the fifth calendar day following either the date of the request by the Committee or the ending date of the period to be covered by the report, whichever is later.

(g) Organically produced raisins. For purposes of this section, organically produced raisins means raisins that have been certified by an organic certification organization currently registered with the California Department of Food and Agriculture or such certifying organization accredited under the National Organic Program. Handlers of such raisins shall submit the following reports to the Committee by varietal type: *Provided*: That, for the Other Seedless varietal type, handlers shall report such information for the different types of Other Seedless raisins.

(1) Inventory report of organically-produced raisins. Each handler shall submit to the Committee by the close of business on July 31 of each crop year, and not later than the following August 6, on an appropriate form provided by the Committee, a report showing, with respect to the organically-produced raisins held by such handler:

(i) The quantity of free tonnage raisins, segregated as to locations where they are stored and whether they are natural condition or packed;

(ii) The quantity of reserve tonnage raisins held for the account of the Committee;

(iii) The quantity of off-grade raisins segregated as to those for reconditioning and those for disposition as such.

(2) Acquisition report of organically-produced standard raisins. Each handler shall submit to the Committee for each week (Sunday through Saturday or such other 7–day period for which the handler has submitted a proposal to and received approval from the Committee) and not later than the following Wednesday, on an appropriate form provided by the Committee, a report showing the following:

(i) The total net weight of the standard raisins acquired during the reporting period, segregated when appropriate, as to free tonnage and reserve tonnage;

(ii) The location of the reserve tonnage; and

(iii) The cumulative totals of such acquisitions (as so segregated) from the beginning of the current crop year.

(iv) Upon request of the Committee, each handler shall provide copies of the organic certificate(s) applicable to the quantity of raisins reported as acquired.

(3) Disposition report of organically-produced raisins. No later than the seventh day of each month, handlers who are not processors shall submit to the Committee, on an appropriate form provided by the Committee, a report showing the aggregate quantity of free tonnage packed raisins and standard natural condition raisins which were shipped or otherwise disposed of by such handler during the preceding month (exclusive of transfer within the

State of California between the plants of any such handler and from such handler to other handlers). Such information shall include:

(i) Domestic outlets (exclusive of Federal government purchases) according to the quantity shipped in consumer cartons, the quantity of bags having a net weight content of 4 pounds or less, and the quantity shipped in bulk packs (including, but not limited to those in bags having a net weight content of more than 4 pounds);

(ii) Federal government purchases;

(iii) Export outlets according to quantity shipped in consumer cartons, the quantity shipped in bags having a net weight of 4 pounds or less, and the quantity shipped in bulk packs (including, but not limited to those in bags having a net weight content of more than 4 pounds);

(iv) Export outlets, by countries of destination; and

(v) Each of any other outlets in which the handler disposed of such raisins other than by any transfer which is excluded by the preceding sentence.

(h) Certification of report. All reports submitted to the Committee pursuant to this part shall be dated, and certified to the United States Department of Agriculture and to the Raisin Administrative Committee as to the truthfulness, accuracy and completeness of the information shown thereon.

(i) Reporting by non-profit cooperative associations. Non-profit cooperative associations need not submit door tags, door receipts, weight

certificates or other similar documents with its report as to raisins received or acquired from its members.

(j) Exemption from filing report. A handler may be relieved by the Committee of submitting any of the reports required pursuant to paragraph (b) of this section which he shall specify in a written application therefor to the Committee stating that no transactions subject to such reports are contemplated for the balance of the crop year: *Provided*, That any such exemption shall remain in effect only so long as said handler has no such transactions subject to such reports.

Supreme Court, U.S.
FILED
DEC 8 - 2014
OFFICE OF THE CLERK

No. 14-275

In the Supreme Court of the United States

MARVIN D. HORNE, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Secretary of Agriculture's marketing order stabilizing the market for California raisins—under which a percentage of the raisins that a producer offers for sale may be required to be sold in a manner directed by the Secretary, with the producer retaining equitable rights in the proceeds—effects a per se taking under the Just Compensation Clause.

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In the Supreme Court of the United States

No. 14-275

MARVIN D. HORNE, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 750 F.3d 1128. The opinion of the district court (Pet. App. 125a-189a) is not published in the *Federal Supplement*, but is available at 2009 WL 4895362.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 2014. On July 16, 2014, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including September 8, 2014, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Agricultural Marketing Agreement Act of 1937 (AMAA), ch. 296, 50 Stat. 246, was enacted dur-

ing the Great Depression "in response to plummeting commodity prices, market disequilibrium, and the accompanying threat to the nation's credit system." Pet. App. 193a; see 7 U.S.C. 601. The AMAA "contemplates a cooperative venture" among the Secretary of Agriculture (Secretary), agricultural producers, and handlers of agricultural products, "the principal purposes of which are to raise the price of agricultural products and to establish an orderly system for marketing them." *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 346 (1984); see 7 U.S.C. 602 (declaration of policy); *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 461-462 (1997).

To achieve these goals, the Secretary is authorized to promulgate marketing orders that regulate the "handling of [certain] agricultural commodit[ies] or product[s] thereof," in interstate or foreign commerce. 7 U.S.C. 608c(1). Marketing orders do not directly regulate "producers" (*i.e.*, the farmers) who grow the agricultural commodities. Instead, marketing orders directly regulate only the "handlers" of agricultural commodities and products (*i.e.*, those who process the products for marketing). See 7 U.S.C. 608c(1); see 7 C.F.R. 989.11, 989.15 (regulatory definitions of raisin producers and handlers). The Secretary may choose among various market-regulation tools, such as limiting the total quantity of a commodity or product that can be marketed or transported, 7 U.S.C. 608c(6)(A) and (C); allotting the amount that each handler may purchase from or handle on behalf of any or all producers, 7 U.S.C. 608c(6)(B); or (as directly relevant here) establishing "reserve pools of any such commodity or product" and "providing for the equitable distribution of the net return derived from the sale

thereof among the persons beneficially interested therein," 7 U.S.C. 608c(6)(E).

In general, a marketing order proposed by the Secretary does not become effective unless approved by two-thirds of producers (by number or by volume of production). 7 U.S.C. 608c(8) and (9). Similarly, the Secretary must terminate any marketing order when termination is favored by more than 50% (by volume) of the producers. 7 U.S.C. 608c(16)(B); 7 C.F.R. 989.91(c).

2. This case concerns the marketing order that regulates the market for California raisins. See 7 C.F.R. Pt. 989. The California raisin industry accounts for 99.5% of the domestic supply, and 40% of the world's supply, of raisins. Pet. App. 196a n.7.

The domestic demand for raisins is relatively stable, averaging approximately 210,000 tons per year. See Raisin Admin. Comm., *Marketing Policy & Industry Statistics 2013* 4 (Oct. 24, 2013) (*Raisin Statistics*), http://www.raisins.org/images/marketing%20policy%202013.pdf. The annual raisin supply, however, can fluctuate dramatically depending upon the amount of planting in prior years; the presence of weather patterns that affect the sun-drying method of producing raisins; and the profitability of alternative uses for grapes, including sale as fresh grapes, wine, or juice. See 71 Fed. Reg. 29,569 (May 23, 2006). For example, the 1998-1999 crop year yielded approximately 240,000 tons of natural seedless raisins, while the 2000-2001 crop year yielded more than 430,000 tons. *Ibid.* The fluctuations in raisin supply "can result in producer price instability and disorderly market conditions." *Ibid.* Before the enactment of the AMAA, raisin growers had in some years been forced to sell their raisins "at

prices regarded by students of the industry as less than the cost of production." Pet. App. 4a (quoting *Parker* v. *Brown*, 317 U.S. 341, 364 (1943)).

Following a spike in production that caused raisin prices to decline sharply from $235 per ton to $40-$60 per ton, the Secretary in 1949 issued the marketing order for California raisins "at the request of the raisin industry." Pet. App. 4a, 41a, 196a. The raisin marketing order sought "to stabilize producer returns by limiting the quantity of raisins sold by handlers in the domestic competitive market." *Lion Raisins, Inc.* v. *United States*, 416 F.3d 1356, 1359 (Fed. Cir. 2005). The order maintains a stable market price by, under certain circumstances, controlling raisin supply through the establishment of annual "reserve pools" of raisins that will not be released immediately into the open domestic market. See 7 U.S.C. 608c(6)(E); 7 C.F.R. 989.54(d), 989.65. The program is designed "to keep raisin supply relatively constant from year to year, smoothing the raisin supply curve and thus bringing predictability to the market for producers and consumers alike." Pet App. 2a.

The raisin marketing order establishes the Raisin Administrative Committee (RAC), consisting of 47 members, with 35 representing producers, 10 representing handlers, one representing a cooperative bargaining association, and one representing the public. See 7 C.F.R. 989.26. Producers and handlers nominate their representatives to the RAC and vote for their preferred candidates; the Secretary selects from those nominees or other eligible producers and handlers. See 7 C.F.R. 989.29, 989.30.

The raisin marketing order requires handlers to file certain reports with the RAC, such as reports

concerning the quantity of raisins they hold or acquire. 7 C.F.R. 989.73. The order additionally requires handlers to allow the RAC access to their premises, raisins, and business records to verify the accuracy of the handlers' reports. 7 C.F.R. 989.77. The order also requires handlers to obtain inspections of raisins they acquire, 7 C.F.R. 989.58(d), and to pay certain assessments, 7 C.F.R. 989.80, which help defray the RAC's administrative costs, including the costs of enforcing the marketing order, Pet. App. 128a.

Every year, the RAC reviews the crop yield, inventories, and shipments of raisins and determines whether to recommend that the Secretary establish reserve pools for any or all of the eight varietal types of raisins. 7 C.F.R. 989.54; see 7 C.F.R. 989.10. If the RAC recommends a reserve pool, it further recommends what portion of the year's production should be included in that pool (the "reserve percentage"), with the balance made available for sale on the open market (the "free percentage"). 7 C.F.R. 989.54(d), 989.55. Based on the percentages recommended by the RAC and set by the Secretary, the raisins that a handler receives from producers are then divided into two groups: "free tonnage" and "reserve tonnage." 7 C.F.R. 989.65.

The handler pays producers for the free tonnage at market prices and may resell those raisins without restriction. 7 C.F.R. 989.65; *Lion Raisins*, 416 F.3d at 1360. Producers do not receive immediate direct payment for the reserve tonnage. *Lion Raisins*, 416 F.3d at 1360. The handler holds the reserve tonnage "for the account of the [RAC]," 7 C.F.R. 989.66(a), with producers entitled to an "equitable distribution of

the net return" from such raisins, 7 U.S.C. 608c(6)(E); see 7 C.F.R. 989.66(h) ("The net proceeds from the disposition of reserve tonnage raisins * * * shall be distributed by the committee to the respective producers * * * on the basis of the volume of their respective contributions."). No provision of the marketing order divests the producer of title to the reserve raisins, which are generally treated as the producers' "sole and absolute property." See Office of Mgmt. & Budget (OMB), OMB No. 0581-0178 (Jan. 2014) (Assignment Form), http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5094721 (form for assigning interest in reserve raisins).

The regulations governing the disposal of reserve-tonnage raisins require that the raisins "shall be sold to handlers at prices and in a manner intended to maxim[ize] producer returns and achieve maximum disposition of such raisins by the time reserve tonnage raisins from the subsequent crop year are available." 7 C.F.R. 989.67(d)(1). The RAC can direct the disposal of the reserve raisins in a variety of ways not expected to undermine domestic market prices for free-tonnage raisins. *Lion Raisins*, 416 F.3d at 1359-1360; see 7 C.F.R. 989.67. Reserve tonnage is often sold, following an initial delay, as free tonnage that can enter the domestic raisin market without restriction. 7 C.F.R. 989.54(g), 989.56. The RAC uses the proceeds from the sale of reserve raisins to pay the costs of administering the reserve pool and to promote the sale of raisins domestically and abroad, with surplus proceeds distributed to producers on a pro rata basis. 7 U.S.C. 608c(6)(E); 7 C.F.R. 989.53(a), 989.66(h). A producer's equitable share of the proceeds from the reserve-tonnage raisins may be assigned to third

parties in exchange for compensation. See Assignment Form.

Due to the considerable fluctuations in raisin supply, the reserve pool may vary significantly from year to year. In many years—for example in the 1998-1999, 2004-2005, 2010-2011, 2011-2012, 2012-2013, 2013-2014, and 2014-2015 crop years—there was or will be no reserve raisin pool at all for natural seedless raisins, meaning that all such raisins are free tonnage that may be sold by the handlers with no restrictions. See *Raisin Statistics* 1-2, 29; RAC, *Minutes of the Raisin Administrative Committee* 4 (Aug. 14, 2014), http://www.raisins.org/index.php/reports/rac-minutes/441-august-14-2014. In the 2002-2003 and 2003-2004 crop years at issue in this case, the Secretary, while declining to impose any reserve-pool requirements for certain types of raisins, required reserves of 47% and 30% respectively for natural seedless raisins. *Raisin Statistics* 29; see Pet. App. 111a. In the 2002-2003 crop year, producers received $272.73 per ton as their equitable share of the reserved natural seedless raisins, resulting in a total of $47.9 million in net distributions to all producers combined. See RAC, *Statement of Disposition and Grower Equity 2002-03 Natural Seedless Reserve Pool.*[*] No payments were made for the 2003-2004 crop year because no surplus from the sale of reserve raisins remained after the RAC met its expenses and funded export-promotion activities. See RAC, *Memo to All 2003-2004 Natural (sun-dried) Seedless Grow-*

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[*] In a previous brief in this Court, the government incorrectly stated that producers received only $27.45 per ton. Gov't Br. 7, 133 S. Ct. 2053 (No. 12-123).

ers regarding 2003-04 Natural (sun-dried) Seedless Reserve Pool 1 (June 23, 2008).

A handler who violates any provision of the marketing order or its implementing regulations is subject to a civil penalty of up to $1100 per day of violation. 7 U.S.C. 608c(14)(B); 7 C.F.R. 3.91(b)(1)(vii); see 12-123 J.A. 106-107 & n.2. In addition, a handler that does not comply with the reserve-pool requirement "shall compensate the [RAC] for the amount of the loss resulting from his failure to so deliver" reserve raisins when requested by the RAC. 7 C.F.R. 989.166(c).

3. Petitioners own and operate vineyards in California where, since 1969, they have grown grapes and produced raisins. Pet. App. 33a. For six years, petitioner Marvin D. Horne served as a member or alternate member of the RAC. *Id.* at 34a. As raisin growers, petitioner Horne and his family do business under the name "Raisin Valley Farms." Pet. 7-8; Pet. App. 33a.

After operating as raisin producers for more than 30 years, petitioners devised a plan to purchase equipment to clean, stem, sort, and package raisins, and to operate their own packing and handling operations under the name "Lassen Vineyards." Pet. App. 36a-37a. Petitioners asserted the position that if they packed and marketed their own raisins, they would be exempt from any raisin reserve-pool requirements. Pet. 7-8; Pet. App. 7a, 34a.

Under petitioners' new "Lassen Vineyards" operations, they packed raisins that they owned and produced in their Raisin Valley Farms operation, and also packed, for a fee, raisins produced and owned by more than 60 other farmers. Pet. 8; Pet. App. 7a, 36a, 38a, 65a, 200a. Petitioners' facilities processed more than

three million pounds of raisins during the 2002-2003 and 2003-2004 crop years. Pet. App. 145a, 200a. Petitioners owned only 27.4% of the raisins they processed in 2002-2003, and owned no more than 12.3% of the raisins they processed in 2003-2004. See Gov't Br. 9 nn.7 & 8, 133 S. Ct. 2053 (No. 12-123).

The Department of Agriculture repeatedly informed petitioners that they would still be subject to the reserve-pool requirement under their new arrangement. Pet. App. 35a-36a. Among other things, the Department notified petitioners that "[m]ore than half of the recognized handlers on the RAC Raisin Packer list are also producers of raisins," who have "their own production brought to their plant" but nonetheless comply with the reserve-pool requirement. C.A. Supp. E.R. 80. Petitioners "expressly disregarded" the Department's advice and proceeded to pack raisins without "hold[ing] any raisins in reserve in respect to any of the raisins * * * received from and packed for growers during the 2002-2003 and 2003-2004 crop years." Pet. App. 36a. Petitioners thus apparently sold their raisins at a price supported by the reserve-pool requirements that their competitors observed but they themselves did not. *Id.* at 33a, 51a.

4. In 2004, the Administrator of the Agricultural Marketing Service (an agency within the Department of Agriculture) initiated a proceeding against petitioners, alleging that they had violated various provisions of the raisin marketing order and implementing regulations during the 2002-2003 and 2003-2004 crop years. Pet. App. 133a-134a, 200a. An administrative law judge (ALJ) held a three-day hearing, *id.* at 134a, during which petitioners admitted that they did not

hold raisins in reserve, *id.* at 36a, 133a, and also admitted that they failed to pay required assessments, failed to have incoming inspections performed, failed to report their acquisitions of raisins, and failed accurately to file certain other forms as well, *id.* at 36a-40a, 132a-133a.

The ALJ rejected petitioners' argument that they were not handlers subject to the raisin marketing order's requirements. Pet. App. 46a-53a. The ALJ found that petitioners committed 673 violations of the raisin marketing order, including 592 violations (one per day) for failure to reserve required raisins for 294 days during the 2002-2003 crop year and failure to reserve required raisins for 298 days during the 2003-2004 crop year. *Id.* at 43a-44a, 53a, 103a. The ALJ also found that petitioners "acted willfully and intentionally when they decided to * * * not hold raisins in reserve" and that petitioners' "violations were deliberate and were designed to obtain an unfair competitive advantage over other California raisin handlers who were in compliance with the Raisin Order." *Id.* at 33a, 51a.

A Department of Agriculture judicial officer affirmed the ALJ's decision in relevant part. Pet. App. 56a-98a; see also *id.* at 101a-124a. Petitioners were ordered to pay $8,783.39 in unpaid assessments, $202,600 in civil penalties, and $483,843.53 for the raisins they had failed to reserve in the 2002-2003 and 2003-2004 crop years. *Id.* at 8a n.6.

5. Petitioners sought judicial review of the agency's decision in district court, contending, *inter alia*, that the reserve-pool requirement results in a per se physical taking without just compensation, in violation of the Just Compensation Clause of the Fifth Amend-

ment. Pet. App. 138a, 176a-184a. The district court concluded that petitioners met the regulatory definition of raisin handlers and were subject to the requirements of the raisin marketing order. *Id.* at 140a-163a. The court also concluded that "the reserve tonnage [requirement] does not constitute a physical taking." *Id.* at 184a (emphasis omitted); see *id.* at 176a-187a.

The court of appeals affirmed. Pet. App. 191a-219a. The court's amended opinion concluded that it lacked jurisdiction to address petitioners' takings claim, because petitioners were required to seek just compensation for any taking by bringing suit in the Court of Federal Claims under the Tucker Act, 28 U.S.C. 1491(a)(1). Pet. App. 233a-236a.

This Court reversed that jurisdictional holding. 133 S. Ct. 2053. The Court explained that "[p]etitioners' taking claim * * * was properly before the court [of appeals] because the AMAA * * * withdraws Tucker Act jurisdiction over takings claims brought by raisin handlers." *Id.* at 2056. The Court, however, took "no position on the merits of petitioners' takings claim," *id.* at 2061 n.5, and instead simply remanded the case to the court of appeals, *id.* at 2064. The Court left open, *inter alia*, the question whether a raisin *producer* could seek compensation for reserve-pool raisins under the Tucker Act and, if so, whether the availability of such a Tucker Act suit would provide an avenue for just compensation that would defeat petitioners' takings claim on the merits. *Id.* at 2062 n.7.

6. On remand, following supplemental briefing and oral argument, the court of appeals rejected petitioners' takings claim on the merits. Pet. App. 1a-29a.

The court initially concluded that petitioners had standing to challenge the reserve-pool requirement, even as to raisins that they themselves did not produce, because they had been injured by the monetary penalties imposed on them as handlers for failing to set aside raisins for the reserve pool. *Id.* at 10a-12a. And the court reasoned that the constitutionality of those penalties turned on whether the reserve-pool requirement effects a taking of raisins (regardless of whether the raisins are owned by petitioners) without just compensation (regardless of whether the just compensation would be owed to petitioners). *Id.* at 12a-15a. But the court, noting that petitioners had "intentionally declined" to argue that the reserve-pool requirement constitutes a regulatory taking under this Court's decision in *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104 (1978), rejected petitioners' theory that the reserve-pool requirement constitutes a "categorical" or "per se" taking. Pet. App. 16a.

The court of appeals recognized that this Court's decision in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)—which involved a law requiring a landlord to "permit a cable television company to install its cable facilities upon his property," *id.* at 421—"holds that permanent physical invasions of real property work a per se taking." Pet. App. 17a. For "[t]wo independent reasons," however, it found *Loretto* not to be controlling in this case. *Ibid.* First, the court found it significant that the marketing order operates against personal property, rather than real property. *Id.* at 18a. The court noted that "this distinction does not mean the Takings Clause is inapplicable" and that the "precise contours" of the "differ-

ing levels of protection" for different types of property "are not entirely sharp." *Id.* at 18a-19a. But, the court reasoned, this Court's decision in *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (2002), "suggests the government's authority to regulate [personal property] without working a taking is at its apex where, as here, the relevant governmental program operates against personal property and is motivated by economic, or 'commercial,' concerns." Pet. App. 19a. The court thus "s[aw] no reason to extend *Loretto* to controversies involving personal property." *Id.* at 20a.

Second, and "[e]qually importantly," the court found this case "[u]nlike *Loretto*" because petitioners "did not lose all economically valuable use" of their property. Pet. App. 20a. The court reasoned that *Loretto* "applies only when *each* strand from the bundle of property rights" is 'chopped through . . . taking a slice of every strand,'" and that raisin producers' "rights with respect to the reserved raisins are not extinguished because [they] retain the right to the proceeds from their sale." *Id.* at 20a-21a (quoting *Loretto*, 458 U.S. at 435 (internal quotation marks omitted), and citing 7 U.S.C. 608c(6)(E)); 7 C.F.R. 989.66(h)). The court additionally noted that petitioners enjoy the market-stabilization benefits of the reserve pool. *Id.* at 21a-22a.

Against this background, the court of appeals concluded that the "appropriate framework to decide this case given the significant but not total loss of [petitioners'] possessory and dispositional control over their reserved raisins" was by analogy to this Court's approach to evaluating the constitutionality of conditions on land-use permits. Pet. App. 23a n.18. The

court observed that the Secretary "did not authorize a forced seizure of [petitioners'] crops, but rather imposed a condition on [their] *use* of their crops by regulating their sale." *Id.* at 25a. The court thus reasoned that the reserve-pool requirement was, "[a]t bottom," a "use restriction applying to [petitioners] insofar as they voluntarily choose to send their raisins into the stream of interstate commerce," and thus was analogous to a condition on a land-use permit. *Ibid.*; see *id.* at 25a-26a (noting that the reserve-pool requirement, like land-use-permit conditions, involves "a conditional exaction," the grant of "a government benefit in exchange," and "choice" about whether to use the property in a manner that could trigger the condition). The court stressed that petitioners "can avoid the reserve requirement of the Marketing Order by * * * planting different crops, including other types of raisins not subject to this Marketing Order or selling their grapes without drying them into raisins." *Id.* at 26a.

The court of appeals accordingly applied a test drawn from this Court's decisions in *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994), for determining whether the reserve-pool requirement, viewed as an exaction, was consistent with the Just Compensation Clause. Under that analysis, the court found the reserve-pool requirement constitutional because it had a "sufficient nexus" to the government's goal of stabilizing the raisin market and was "roughly proportional" to that goal, in that it required handers to reserve only as many raisins as necessary each year to achieve market stabilization for the bene-

fit of all producers. Pet. App. 26a-28a; see *id.* at 23a-25a.

ARGUMENT

The raisin marketing order petitioners challenge has been in effect and stabilized the raisin market for 65 years. Petitioners participated in the program for more than 30 years before they chose to intentionally violate the order by processing raisins for themselves and other producers for sale outside the order's procedures. The court of appeals correctly concluded that this order, from which petitioners and other producers have benefited for many years, does not violate the Just Compensation Clause. That conclusion does not conflict with any decision of this Court or any other court of appeals. This case, moreover, would not be a suitable vehicle for reviewing the more general and abstract issues raised by petitioners. Further review is not warranted.

1. a. The Fifth Amendment's Just Compensation Clause provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. Amend. V. This Court has explained that the "paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property." *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005). The Court has also "recognized that government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster—and that such 'regulatory takings' may be compensable under the Fifth Amendment." *Ibid.*

The Court's precedents "stake out two categories of regulatory action that generally will be deemed *per se* takings for Fifth Amendment purposes." *Lingle*,

544 U.S. at 538; see *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1015-1016 (1992) (same). The first is when the "government requires an owner to suffer a permanent physical invasion of her property—however minor"; in such a case, the government "must provide just compensation." *Lingle*, 544 U.S. at 538; see *Lucas*, 505 U.S. at 1015. The second is when a regulation "completely deprive[s] an owner of '*all* economically beneficial use' of her property." *Lingle*, 544 U.S. at 538 (quoting *Lucas*, 505 U.S. at 1019) (brackets omitted). "Outside these two relatively narrow categories (and the special context of land-use exactions * * *), regulatory takings challenges are governed by the standards set forth in" *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104 (1978). *Lingle*, 544 U.S. at 538. The *Penn Central* standards require a "case-specific inquiry into the public interest advanced in support of the restraint," *Lucas*, 505 U.S. at 1015, and examine, *inter alia*, the "character of the governmental action," the "economic impact of the regulation on the claimant," and "the extent to which the regulation has interfered with distinct investment-backed expectations," *Lingle*, 544 U.S. at 538-539 (quoting *Penn Central*, 438 U.S. at 124).

b. Petitioners have disavowed any reliance on the case-specific *Penn Central* inquiry. They apparently recognize that the raisin marketing order's fair and proven measures for stabilizing the raisin market plainly do not result in a taking under that test. The "character of the governmental action" is one of reasonable regulation of a commercial market in an agricultural commodity; the "economic impact of the regulation" is to stabilize the market and ensure a suffi-

cient price level for producers, including petitioners; and petitioners, after decades of participation in the raisin market under the order, had no "distinct investment-backed expectations" in being able to market their raisins without complying with the order's reasonable requirements. *Lingle*, 544 U.S. at 538-539 (quoting *Penn Central*, 438 U.S. at 124).

Petitioners nevertheless contend that the raisin marketing order effects a categorical, per se taking. Pet. App. 16a. The order's reserve-pool requirement, however, is not one of the types of per se takings recognized by this Court. As a threshold matter, the requirement that handlers reserve a certain amount of raisins is not "a direct government appropriation or physical invasion of private property." *Lingle*, 544 U.S. at 537. Petitioners' characterization of the reserve pool as the "government's acquisition of title to personal property," Pet. 22, is inaccurate. Although the Court of Federal Claims has described the reserve pool that way in dicta (see *Evans* v. *United States*, 74 Fed. Cl. 554, 558 (2006), aff'd, 250 Fed. Appx. 321 (Fed. Cir. 2007) (per curiam) (unpublished), cert. denied, 552 U.S. 1187 (2008)), see Pet. 5, nothing in the regulations cited by that court, or by petitioners (see *ibid.*), supports that description. The reserve-pool raisins are held "for the account" of the RAC, 7 C.F.R. 989.66(a), but neither the AMAA nor the marketing order provides that the RAC "takes title" (Pet. 22) to the reserve raisins. Rather, as previously discussed, pp. 5-7, *supra*, the marketing order regulates, in certain crop years, the timing and conditions under which the reserve raisins can be sold, with the producers retaining the rights to the net proceeds of any sale.

The reserve-pool requirement also does not fit within the "relatively narrow categories," *Lingle*, 544 U.S. at 538, of per se regulatory takings. First, the requirement is not a "permanent physical invasion" of anyone's raisins. *Ibid.* This Court has identified the situation presented in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), which involved a state-law requirement to allow cable equipment to be installed on the roof and side of a building, as the archetypical example of this sort of taking. See *Lingle*, 544 U.S. at 538; *Lucas*, 505 U.S. at 1015. This case presents no personal-property analogue to the taking at issue in *Loretto*. The Court in *Loretto* emphasized that the regulation there "d[id] not simply take a single 'strand' from the 'bundle' of property rights," but instead "chop[ped] through the bundle, taking a slice of every strand." 458 U.S. at 435. Among other things, it deprived the owner of "the right to use and obtain a profit from property" and "empt[ied]" the right to transfer or sell the affected property "of any value." *Id.* at 436. The same is not true here. Under both the AMAA and the implementing regulations for the raisin marketing order, the producer retains an equitable right in the proceeds of the reserve raisins. 7 U.S.C. 608c(6)(E); see 7 C.F.R. 989.66(h); see also pp. 5-7, *supra*. Those equitable rights have monetary value and can be transferred for consideration. See pp. 5-7, *supra*. Moreover, the net effect of the reserve-pool requirement is to raise the value of a producer's raisins as a whole, by stabilizing the market price of raisins and increasing revenues from the sale of the free-tonnage raisins. See pp. 3-4, *supra*.

Second, because the producer retains valuable rights in the reserve-pool raisins, the raisin marketing order does not "completely deprive an owner of '*all* economically beneficial use' of her property." *Lingle*, 544 U.S. at 538 (quoting *Lucas*, 505 U.S. at 1019) (brackets omitted); see Pet. App. 22a n.17 (concluding that the reserve-pool requirement is not a categorical taking under *Lucas*). The reserve-pool requirement instead functions as a restriction on the sale of raisins. Under the marketing order, reserve-pool raisins are "held * * * for the account of the" RAC, 7 C.F.R. 989.66(a), which determines how those raisins will be disposed of, bearing in mind that they "shall be sold to handlers at prices and in a manner intended to maximum producer returns and achieve maximum disposition of such raisins by the time reserve tonnage raisins from the subsequent crop year are available," 7 C.F.R. 989.67(d)(1); see *Lion Raisins, Inc.* v. *United States*, 416 F.3d 1356, 1359 (Fed. Cir. 2005); see 7 C.F.R. 989.65-989.67. Any proceeds from the disposition of the reserve raisins—minus administrative costs, which directly fund the RAC activities from which all producers benefit through higher raisin prices—go to the producers. See 7 U.S.C. 608c(6)(E); 7 C.F.R. 989.53(a), 989.66(h).

Although the mechanics of the raisins' disposal are carried out by the RAC, rather than by the producer, the raisin marketing order is effectively indistinguishable from a scheme in which the producer itself disposes of the raisins in a manner approved by the RAC, such as controlling when certain raisins are sold or the markets in which they may be sold. Such a scheme does not violate the Just Compensation Clause. Indeed, petitioners do not meaningfully dispute that if

the marketing order "limited the amount of a crop that a farmer can sell, that would be a use restriction" and would not amount to a per se taking. Pet. 33; see *Andrus* v. *Allard*, 444 U.S. 51, 66 (1979) (regulation that barred sale of certain items and thus "prevent[ed] the most profitable use of [plaintiffs'] property" did not effect a taking). Such a program does not become *less* constitutional when certain avenues for sale are left open and the producers have rights in the proceeds of any sale.

2. The court of appeals' rejection of petitioners' per se takings argument is consistent with the decisions of this Court and other courts. In *United States* v. *Rock Royal Co-Op Inc.*, 307 U.S. 533 (1939), this Court reversed a lower-court decision that had found an AMAA marketing order for milk (which employed an alternative to the reserve-pool requirement) to "take[] property without compensation." *Id.* at 541; see *id.* at 568-581. Since then, lower courts have consistently rejected Just Compensation Clause challenges to AMAA marketing orders, including challenges to the raisin marketing order at issue here. See *Evans*, 74 Fed. Cl. at 562-565; see also *Cal-Almond, Inc.* v. *United States*, 30 Fed. Cl. 244, 246-247 (Fed. Cl. 1994) (rejecting challenge to almond marketing order), aff'd, 73 F.3d 381 (Fed. Cir. 1995) (Tbl.), cert. denied, 519 U.S. 963 (1996); *Carruth* v. *United States*, 627 F.2d 1068, 1081 (Ct. Cl. 1980) (rejecting challenge to peanut marketing order); *Wallace* v. *Hudson-Duncan & Co.*, 98 F.2d 985, 989 (9th Cir. 1938) (rejecting challenge to walnut marketing order); *Prune Bargaining Ass'n* v. *Butz*, 444 F. Supp. 785, 793 (N.D. Cal. 1975) (rejecting challenge to prune

marketing order), aff'd, 571 F.2d 1132 (9th Cir.) (per curiam), cert. denied, 439 U.S. 833 (1978).

3. Petitioners do not claim any conflict on the constitutionality of the raisin marketing order, or any other marketing order. They instead urge this Court to grant review to address a set of more abstract issues involving the Just Compensation Clause, asserting that each is the subject of a circuit conflict. None of those issues warrants this Court's review in this case.

a. First, petitioners seek review of what they assert was the court of appeals' "holding that government appropriation of personal property is never categorically subject to" the Just Compensation Clause. Pet. 16; see *id.* at 15-26. But even assuming *arguendo* that the court below in fact reached such a conclusion, it would have been only one of "[t]wo independent reasons" for rejecting petitioners' reliance on *Loretto*. Pet. App. 17a-18a. The court separately reasoned that even if *Loretto* applied, petitioners still would not prevail because "[u]nlike" in *Loretto*, petitioners "did not lose all economically valuable use" of their property. *Id.* at 20a.

In any event, it is far from clear that the decision below announced the broad principle that petitioners ascribe to it. The court of appeals concluded that *Loretto* did not in itself "govern controversies involving personal property"; observed that the constitutional distinctions between regulations of different types of property "are not entirely sharp"; and interpreted *Lucas* v. *South Carolina Coastal Council*, *supra*, to "suggest[] the government's authority to regulate [personal property] without working a taking is at its apex where, as here, the relevant governmen-

tal program operates against personal property and is motivated by economic, or 'commercial,' concerns." Pet. App. 19a-20a. The court did not preclude the conclusion that *other* circumstances, involving direct governmental acquisition of personal property, could be viewed as per se takings.

Decisions cited by petitioners (Pet. 18-19) address laws substantially different in nature from the "economic or 'commercial'" regulation reflected in the raisin marketing order, and thus do not suggest that other courts would have decided this case differently. See *Cerajeski* v. *Zoeller*, 735 F.3d 577, 580 (7th Cir. 2013) (application of abandoned-property statute constituted taking of interest from bank account); *Anderson* v. *Spear*, 356 F.3d 651, 668-670 (6th Cir.) (application of election-law statute requiring relinquishment of campaign funds after an election constituted per se taking), cert. denied, 543 U.S. 956 (2004); *Nixon* v. *United States*, 978 F.2d 1269, 1284-1287 (D.C. Cir. 1992) (application of records statute constituted per se taking of ex-President's papers); *Porter* v. *United States*, 473 F.2d 1329, 1336 (5th Cir. 1973) (application of ad hoc statute about Lee Harvey Oswald's effects constituted taking); see also *Rose Acre Farms, Inc.* v. *United States*, 373 F.3d 1177, 1197-1198 (Fed. Cir. 2004) (concluding that destruction of diseased hens was not a per se taking), cert. denied, 545 U.S. 1104 (2005); *United States* v. *Corbin*, 423 F.2d 821, 826 (10th Cir. 1970) (including value of fish in computation of compensation for condemnation of land containing fish farm). The absence of a square circuit conflict, in combination with the uncertainty about whether or how the decision below might be interpreted in future cases, counsels strongly against

granting certiorari on an issue that even the court of appeals did not view as crucial to the result here.

b. Second, petitioners contend that the decision below held that "appropriation of property—even of real property, evidently—is a per se taking *only* if it deprives the owner of '*all* rights associated with the property.'" Pet. 26 (citation omitted); see Pet. 26-29. Petitioners' contention, however, rests on a misunderstanding of both the raisin marketing order and the decision below. Petitioners err in contending (Pet. 27) that this case involves the government's "taking of actual ownership and possession" of producers' raisins. As explained above, see p. 17, *supra*, nothing in the marketing order transfers title in the reserve raisins from petitioners to the government, and possession of the reserve raisins remains with the handlers to whom the producers voluntarily send the raisins, see 7 C.F.R. 989.66(a). The court of appeals recognized as much, distinguishing the marketing order's effect on "possessory and dispositional control" from a "transfer of title." Pet. App. 25a-26a. Decisions cited by petitioners (Pet. 27-28), in which the government (as in *Loretto*) physically takes complete dominion over a portion of a plaintiff's property, are inapposite and do not show a circuit conflict in the circumstances of this case. See *Casitas Mun. Water Dist.* v. *United States*, 543 F.3d 1276, 1291-1292 (Fed. Cir. 2008) (government "actively caused the physical diversion of water," thereby "reducing [plaintiff's] water supply"); *Gulf Power Co.* v. *United States*, 187 F.3d 1324, 1328 (11th Cir. 1999) (government allowed by statute "to permanently occupy physical space on [a cable company's] poles, ducts, conduits, and rights-of-way").

c. Finally, petitioners seek review (Pet. 29-36) of the court of appeals' application to the circumstances of this case of a nexus-and-proportionality test drawn from *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994). In petitioners' view (Pet. 29), *Nollan* and *Dolan* are inapplicable to a situation involving "the government's acquisition of title to the reserve raisins." See, *e.g.*, Pet. 33. Again, however, petitioners' argument rests on the erroneous premise that the raisin marketing order transfers all interests in reserve raisins. Compare, *e.g.*, *ibid.* (characterizing raisin marketing order as a transfer of title and a "physical transfer of raisins"), with p. 17, *supra* (explaining that no physical or title transfer occurs). Petitioners' assertion of a conflict between the approach taken in the decision below and the approach taken in cases involving actual physical invasions of private property is accordingly misplaced. See Pet. 31-33 (citing *Casitas Mun. Water Dist.*, *supra*; *Gulf Power Co.*, *supra*; and *GTE Nw., Inc.* v. *Public Util. Comm'n of Or.*, 900 P.2d 495, 503 (Or. 1995) (requirement to allow equipment to be installed on private property), cert. denied, 517 U.S. 1155 (1996)). Indeed, to the extent that the court of appeals did not simply deny relief based on the conclusion that no per se taking occurred under *Loretto* or *Lucas* (Pet. App. 20a-22a & n.17), but instead accepted that petitioners could prevail if the reserve-pool requirement failed the *Nollan/Dolan* nexus-and-rough proportionality test, it actually "stretched" existing doctrine (Pet. 30 n.2) in petitioners' favor. And petitioners do not contend that there was a taking here under a *Nollan/Dolan* test. Nor do they contest the court of ap-

peals' conclusion, in applying that test, that there was a close nexus and rough proportionality between the reserve-raisin requirement and the price-stabilization purposes of the marketing order, which directly benefited petitioners and other producers.

4. To the extent that the abstract questions presented in the petition might warrant this Court's review in some case, this particular case would be a poor vehicle for addressing them.

As the discussion above reflects, petitioners' arguments are based largely on a misunderstanding of the raisin marketing order, and any context-specific arguments petitioners might raise about the proper understanding of the raisin marketing order would have limited importance. We are aware of no other pending challenges to the raisin marketing order. Very few other products regulated under the AMAA are even potentially subject to reserve-pool requirements; all of those have separate regulatory schemes; and we are informed by the Department of Agriculture that for all but one of them (tart cherries) the reserve-pool programs have not been in effect for a number of years. See 7 C.F.R. Pt. 930 (tart cherries); 7 C.F.R. Pt. 981 (almonds); 7 C.F.R. Pt. 984 (walnuts); 7 C.F.R. Pt. 987 (dates); 7 C.F.R. Pt. 993 (dried prunes).

In any event, if more than 50% of raisin producers (as measured by volume of raisins) believe that the raisin marketing order is unnecessary, they can vote to repeal it. 7 U.S.C. 608c(9) and (16)(B); 7 C.F.R. 989.91(c). The absence of any such action during the 65 years that the raisin marketing order has been in effect indicates that raisin farmers generally perceive themselves to be advantaged by the order's stabiliza-

tion of raisin prices. Indeed, in 1989, producers rejected the Secretary's proposal for automatic periodic referenda on the continuance of the raisin marketing order, which would have provided more frequent opportunities for producers to weigh in on that subject. See 54 Fed. Reg. 12,206 (Mar. 24, 1989); 54 Fed. Reg. 34,135 (Aug. 18, 1989). It is also telling that only 18 of the roughly 3000 raisin growers have joined a brief in support of the petition for a writ of certiorari. See DKT Liberty Project & 18 Independent Raisin Growers Amicus Br. 1.

In addition, even assuming the raisin marketing order has the effect petitioners attribute to it, alternate grounds for affirmance could impede the Court from reaching the questions presented. First, even if producers' raisins are deemed to be "taken for public use" by the raisin marketing order, U.S. Const. Amend. V, that would not violate the Just Compensation Clause unless it resulted in "pecuniary loss" to the producers. *Brown* v. *Legal Found. of Wash.*, 538 U.S. 216, 240 (2003). Petitioners have not shown, and cannot show, that the raisin marketing order—the effect of which is to *increase* the market price of raisins, thereby *benefiting* raisin producers—causes such loss.

Second, even assuming the raisin marketing order effected a taking that resulted in a pecuniary loss, it still would not violate the Just Compensation Clause, because Congress has provided a mechanism for producers to obtain "just compensation," U.S. Const. Amend. V. The Tucker Act generally permits a plaintiff—including an aggrieved raisin producer—who believes that the government has taken his property without just compensation to bring an action against

the United States for compensation in the Court of Federal Claims. 28 U.S.C. 1491(a)(1); see *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1016-1017 (1984). The Court has previously recognized that "[t]he availability of a suit for compensation against the sovereign will defeat a contention that the action is unconstitutional as a violation of the Fifth Amendment." *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 697 n.18 (1949). And the Court's previous decision in this case recognized that petitioners' claims might fail for precisely that reason. 133 S. Ct. at 2062 n.7.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2014

Supreme Court, U.S.
FILED
DEC 22 2014
OFFICE OF THE CLERK

No. 14-275

IN THE
Supreme Court of the United States

MARVIN D. HORNE, *et al.*,
Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

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RULE 29.6 STATEMENT

Petitioners have no parent corporations and no publicly held corporation owns 10% or more of their stock.

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INTRODUCTION

The government's Brief in Opposition scarcely attempts to defend the panel's holdings or reasoning on any of the three questions presented in the Petition. Instead, the government seeks to deflect this Court's attention by repeatedly claiming — for the first time — that the Raisin Marketing Order does not "divest[] the [raisin] producer of title to the reserve raisins, which are generally treated as the producers' 'sole and absolute property'" and supposedly never become the property of the Raisin Administrative Committee ("RAC"). BIO 6; *id.* at 17 ("[N]either the AMAA nor the marketing order provides that the RAC 'takes title' ... to the reserve raisins."); *id.* at 23 ("[N]othing in the marketing order transfers title in the reserve raisins from petitioners to the government[.]") Although the government never cites authority for the significance of "title," this forms an essential premise of the government's efforts to salvage the panel decision. *See* BIO 23; *id.* at 24.

The government's "title" argument is in direct conflict with the government's own words at other junctures of this very case, irrelevant to the law, and false in any event. The government's remaining defenses of the panel opinion bear little examination, and its vehicle objections are mere mirages. Since the first panel opinion in this case, the government has shifted arguments three times, from jurisdiction to standing and now to title, all in an attempt to evade the simple conclusion that when the government takes property, sells it, and uses the proceeds for its own purposes, it is required under the Fifth Amendment to pay just compensation.

Enough is enough. This Court should grant certiorari and reverse. Alternatively, in view of the government's inability to plausibly defend the decision below, the Court might consider summary reversal.

REASONS FOR GRANTING THE WRIT

I. THE RAISIN ADMINISTRATIVE COMMITTEE TAKES OWNERSHIP OF RESERVE TONNAGE RAISINS.

The government's principal argument — that because the Order supposedly does not transfer "title" from raisin producers to the RAC, it does not work a per se taking — is misguided on every level.

At the threshold, it reverses the government's prior position in this very case. Just last year, when this case was argued in this Court on the government's jurisdictional theory, counsel for the United States stated exactly the opposite of what the government is saying now:

> If the handler is actually buying raisins from the producer, the handler never takes title to the reserve raisins. And he doesn't pay for the reserve raisins. He takes title to the free-tonnage raisins and *the title to the reserve raisins passes, as a matter of law from the producer to the Raisin Administrative Committee.*

Mar. 20, 2013 Tr. 45:17-24, *Horne v. USDA*, No. 12-123 (*Horne* Tr.).[1]

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[1] All emphasis added unless otherwise noted.

That was the position the United States maintained before every other court to hear this case. *See* U.S. Br. at 43, *Horne v. USDA*, No. 10-15270 (9th Cir. Jul. 21, 2010) (arguing that "'passing title ... to the RAC'" is an "'admission ticket'" to the raisin market) (quoting *Evans v. United States*, 74 Fed. Cl. 554, 563 (2006)); U.S. Surreply in Opp. to Rehearing at 3, *Horne v. USDA*, No. 10-15270 (9th Cir. Feb. 16, 2012) (explaining that "producers ... receive no direct payment when title to a portion of their crop is transferred to the RAC"). Five years ago, the district court in this case considered it "*undisputed* that ... the RAC takes title to a significant portion of a California raisin producer's crop." Pet.App.180a; Pet.App.181a (similar). Having stated for *years*, in *three* different tribunals (including this one), that the RAC takes title to reserve raisins, the government cannot pivot at this late date to the opposite theory that reserve raisins remain "producers' 'sole and absolute property'" after all. BIO 6.

On the merits, the government is mistaken that transfer of title is essential to establish a categorical taking. This Court has never required such a thing; rather, the government's categorical duty of just compensation applies whenever the government "'physically takes possession of *an interest* in property[.]'" *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012) (quoting *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002) (itself citing *United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951))). Actual transfer of title is unnecessary, for when the government takes "'possession and control'" of property it is treated "*as*

if the Government held full title and ownership." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 431 (1982); *United States v. United Mine Workers*, 330 U.S. 258, 284-85 (1947) (plurality) (similar).

This Court's caselaw brims with cases identifying categorical physical takings when the government seizes use and disposition of property, notwithstanding the property owner's retention of title. *See, e.g.*, *Loretto*, 458 U.S. 419; *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979); *Pewee Coal*, 341 U.S. 114; *United States v. Causby*, 328 U.S. 256, 266 (1946); *United States v. General Motors Corp.*, 323 U.S. 373, 383-84 (1945); *United States v. Russell*, 80 U.S. 623, 628 (1871); *see also Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2600 (2013) (explaining that there is a per se taking "when the government commands the relinquishment of funds linked to a specific, identifiable property"). There is no question that the Raisin Marketing Order does *that* when it grants the RAC sole authority to dispose of raisins and to use the revenue from those raisins for its own purposes. The RAC's seizure of reserve tonnage raisins is thus a categorical physical taking whether it obtains "title" to the raisins or not.

Even if formal title mattered, the government's assertion that raisin producers technically retain title is ludicrously weak. The government's sole authority is not a USDA regulation, adjudication, or rulemaking — it is not even an official explanation of agency policy, such as a guidance document or an interpretive statement. It is a single line in a one-page USDA form which raisin producers use when

they wish to assign their "interest" in any "net proceeds" that may be left after the RAC has sold the raisings and spent what it wishes. BIO 6 (citing OMB No. 0581-0178 (Jan. 2014), available at http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5094721). The form's reference to raisins as the producer's "property" simply means that no prior liens or encumbrances related to the raisins prohibit the assignment of the producer's remaining equitable rights (which, again, are often negligible or valueless). The form does not bear on whether the RAC has title when it seizes and disposes of the raisins. If anything, the form confirms that the producers no longer own raisins, but only an "interest" in the "proceeds" from their sale.

Undisputed features of the Raisin Marketing Order vest the incidents of title in the RAC.[2] Raisin producers give up physical possession of reserve tonnage raisins, and raisin handlers must store such raisins "separate and apart" from free-tonnage raisins, "for the account of" the RAC. 7 C.F.R. §§ 989.66(a), (b)(2). The RAC pays the costs of storage. § 989.66(f). The handler must deliver reserve tonnage raisins to the RAC or its designee on demand. § 989.66(b)(4). The RAC may use the raisins as collateral for loans, § 989.66(g), and it can sell or give them away at its discretion, § 989.67(b)-(e). The RAC uses the proceeds to fund its own administrative costs as well as to provide export

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[2] At least one court has described title to reserve tonnage raisins — repeatedly, emphatically and in ways integral to its reasoning — as vesting in the RAC. *Evans*, 74 Fed. Cl. at 557, 558, 559, 562, 563-64. The government cites no caselaw suggesting otherwise.

subsidies to handlers. Producers retain not a claim on the raisins themselves, but a contingent interest in the pool of money left over when the RAC is finished. 7 U.S.C. § 608c(6)(E); 7 C.F.R. §§ 989.53(a), 989.66(h). No wonder courts and the government itself have always concluded that title to the raisins is in the RAC.

The government does not disagree with any of these basic facts about the program. BIO 6-7. The notion that the reserve raisins are nonetheless the raisin producers' "'sole and absolute property'" is simply not a credible description of those raisins' status under the Order.

II. THE GOVERNMENT FAILS TO RESOLVE THE CONFLICTS CREATED BY THE PANEL DECISION.

Aside from its theory that the Raisin Marketing Order does not transfer title in reserve tonnage raisins to the RAC, the government has very little to offer in defense of the panel opinion. Rather than reconcile the panel's reasoning with conflicting caselaw, the government largely rests on arguments that the panel opinion does not mean what it says. In so doing, the government's brief only confirms the need for this Court's review.

First, the government does not dispute that excluding personal property from the per se rule for physical takings would squarely conflict with this Court's precedent and the decisions of other federal courts. BIO 21-22. Instead, the government suggests that the panel opinion left open the possibility that a categorical takings rule could still apply in the event of "direct governmental acquisition of personal property." BIO 22.

That distinction merely repackages the government's baseless "title" argument discussed above. It also fails to grapple with the panel's actual language — "we see no reason to extend *Loretto* to govern controversies involving personal property," Pet.App.20a — or to resolve the resulting split between the Ninth Circuit and the other courts that have done exactly that, *see, e.g.*, *Nixon v. United States*, 978 F.2d 1269, 1284 (D.C. Cir. 1992). The government's suggestion that appropriations of property in the context of "economic or commercial regulation," are treated differently from any other such appropriation, *see* BIO 22 (quotation marks omitted), is unsupported by citation to authority, and this Court has rejected it in any event, *see, e.g.*, *Loretto*, 458 U.S. at 439. Nor does it matter that the panel's distinction between personal property and real property was "only one of [t]wo independent reasons" for refusing to apply the per se rule for physical takings — the other basis being the lack of total deprivation of the Hornes' rights in the raisins. BIO 21. The panel's "[t]wo independent reasons" *each* departed from the decisions of this Court and other courts, and the Hornes present them *both* for this Court's review. *See* Pet. 15, 26.

Second, the government does not disagree that the panel would have erred and split from other decisions if it held that "appropriation of property ... is a per se taking only if it deprives the owner of 'all rights associated with the property.'" Pet. 26 (emphasis and alteration omitted). That, of course, is exactly what the panel said. Pet.App.20a (distinguishing *Loretto* on the ground that "the Hornes did not lose all economically valuable use of their personal property"). The government attempts

to reconcile the resulting split by resorting yet again to the nonexistent distinction between deprivation of "'possessory and dispositional control'" and "'transfer of title,'" BIO 23, *see also id.* ("Decisions cited by petitioners in which the government ... physically takes complete dominion over a portion of a plaintiff's property, are inapposite and do not show a circuit conflict in the circumstances of this case.") (citation omitted). But the government *does* physically take dominion over the reserve raisins; the "economically valuable use" the farmer retains is nothing but a contingent right to manifestly *inadequate* compensation (often nothing at all). If the government and the Ninth Circuit are asserting that the mere *possibility* of *inadequate* compensation renders a seizure of property something other than a per se "taking," that is a reason to grant certiorari and correct the error before it takes hold. *See Tahoe-Sierra*, 535 U.S. at 323 (courts "do not ask whether [a physical appropriation] deprives the owner of all economically valuable use" because that would confuse the separate categories of physical and regulatory takings).

Third, the government does not contest that other courts have squarely held that "actual physical invasions of private property" cannot be recast as use restrictions and subjected to a balancing test. BIO 24. The government's *only* response is once again that this case does not involve a transfer of ownership or an "actual physical invasion[] of property." *Id.* That cannot be reconciled with the Order; witness RAC's right to demand physical surrender of reserve tonnage raisins at the time of its choosing. 7 C.F.R. § 989.66(b)(4); *see also* Pet. 31-33 (collecting cases).

III. THIS CASE IS AN APPROPRIATE VEHICLE FOR RESOLUTION OF THE QUESTIONS PRESENTED.

The government questions this case's suitability for review because it has "limited importance" outside the context of the Raisin Marketing Order. BIO 25. That could hardly be more wrong. Although the government accuses Petitioners of resting their argument on a mere "misunderstanding of the raisin marketing order," *id.*, there is no real dispute about the Order's actual terms or the RAC's powers. *Compare* Pet. 5-7 *with* BIO 5-8. The government's real dispute with Petitioners concerns whether, as a matter of law, the RAC's seizure of the reserve tonnage raisins amounts to a categorical physical taking. As the brief in opposition shows, defending the Order on that ground raises profound questions of takings law, not merely of interpreting the Order.

The same can be said of the many other respects in which the panel opinion conflicts with decisions of this Court and other courts. The notions that seizure of personal property cannot be a categorical taking, or that the possibility of *inadequate* compensation vitiates the requirement of *just* compensation, or that the power to take possession of property and sell it is merely a "use restriction," have far-reaching implications, which cannot logically be confined to the Raisin Marketing Order. The Ninth Circuit's opinion contains propositions that strike at the core of the Just Compensation principle, and that call out for this Court's review.

The government next suggests that this case deserves no further review because the Order does not cause Petitioners any "pecuniary loss." BIO 26.

Petitioners strongly dispute that the Order's supposed purpose of raising the market price of raisins benefits them personally. *See* Pet. 7-8. It is well established that the government cannot seize specific property (or its monetary equivalent) and then avoid compensation by pointing to generalized benefits that property owners might receive from government action. *See, e.g.*, *Village of Norwood v. Baker*, 172 U.S. 269, 279 (1898). That is especially true when nothing in the record supports the government's self-serving claim. Does anyone seriously believe that raisin farmers are better off when the government has taken a third or more of their crop and given them nothing in return? That would require an extraordinary elasticity of demand in a global market where foreign producers can compete without quantity restrictions.

The government proudly notes that the RAC paid producers $272.73 per ton in the 2002-2003 season, citing numbers not in the record. BIO 7. We provide the full RAC reports in a Supplemental Appendix. The government's "gross" number disregards certain deductions, but more importantly, it omits the fact that the RAC sold that year's reserve tonnage raisins for an average of ***$649.47*** per ton — receiving gross sales totaling more than ***$118 million***. It then spent most of the proceeds on its own priorities which provide no benefit to Petitioners, such as nearly $300 per ton of export subsidies paid by the RAC to handlers. *Id.*[3] We are left wondering what

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[3] If the Court wonders why the Marketing Order enjoyed support from some major players in the industry, at least in the past, it need look no further than these below-market sales and

significance the government finds in this number of $272.73 per ton. Surely the government does not mean to suggest that $272.73 per ton is just compensation for raisins it sells for $649.47 per ton. And in other years, such as 2003-04, the government spent the entire proceeds from selling reserve raisins, while the producers got nothing. BIO 7.

Moreover, the government has ordered Petitioners to pay a *penalty* intended to "deter [Petitioners] from continuing to violate the Raisin Order and [to] deter others from similar future violations." Pet.App.98a. Having imposed penalties designed to make Petitioners *worse* off than they would have been if they had complied with the Order, it is not open to the government to deny that Petitioners face a "pecuniary loss." *Cf. Missouri Pac. Ry. Co. v. Nebraska*, 217 U.S. 196, 205-08 (1910) (Holmes, J.) (fines for refusal to submit to unconstitutional takings may be challenged under the Takings Clause).

Finally, the government argues that Petitioners' claims would fail because the Tucker Act provides an alternative remedy. This Court has already foreclosed that argument, holding in this very case that the Agricultural Marketing Agreement Act "provides a comprehensive remedial scheme *that withdraws Tucker Act jurisdiction over a handler's takings claim*." Pet.App.255a. Footnote 7 of this Court's opinion suggests that a Tucker Act remedy may be available to "a *producer* who turns over her reserve tonnage raisins," *id.*, but Petitioners are

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export subsidies, which benefit major packers while injuring independent farmers like the Hornes.

before this Court in their capacity as *handlers* who have *not* turned over raisins. Even if a Tucker Act remedy were theoretically available, the government's argument would eviscerate *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), which holds that a party is not required to pay the United States one day and then sue to get its money back — a rule the Court unanimously reaffirmed in *Horne*. Pet.App.258a. And to the extent the government's Tucker Act argument ever had merit, the government forfeited it long ago. *Horne* Tr. 28:24-25 (Kagan, J.: "[Y]our Tucker Act argument as a substantive argument, I mean, has been waived.").

CONCLUSION

For the foregoing reasons and those set out in the Petition, the Court should grant a writ of certiorari. In view of the government's inability to provide any legally plausible defense of the decision below, the Court might consider summary reversal.

Respectfully submitted,

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December 22, 2014

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APPENDIX

RAISIN ADMINISTRATIVE COMMITTEE
STATEMENT OF DISPOSITION AND GROWER EQUITY
2003-04 NATURAL SEEDLESS RESERVE POOL
(NATURAL CONDITION WEIGHTS IN TONS)

THIS STATEMENT IS THE FINAL STATEMENT ON THE 2003-04 NATURAL SEEDLESS RESERVE POOL. A STATEMENT OF SALES, EXPENSES, GROWER'S EQUITY AND PRIOR PAYMENTS FOLLOWS:

RESERVE POOL SALES:

TONNAGE	SALES PRICE
80,992.0000	TONS @ 1,270.00
28,686.9458	TONS @ 1,818.00
82.9480	TONS @ 700.00
2,912.0960	TONS @ DONATIONS

		GROSS SALES	PER RESERVE TON
80,043.9868	GROWER EQUITY BASE TONS	$ 111,343,848.17	$ 1,349.30
OTHER INCOME:			
	INTEREST EARNED	749,351.98	8.42
	BIN RENTAL INCOME	970.00	0.01
	MISCELLANEOUS INCOME	917.52	0.01
	UNUSED ASSOCIATION FEES	222,592.50	$ 2.50
		$ 112,316,681.15	$ 1,360.24
POOL EXPENSES ON POOL TONNAGE:			
Storage and Fumigation		5,923,286.09	65.40
Bin Rental - Deficiency		237,080.00	2.66
Raisin Insurance		148,088.94	1.66
Inspection Fees		818,508.89	9.19
Bin & Hauling Reimbursement		1,776,168.80	19.96
RAC Bins and Raisin Transfer Costs		857,836.36	9.63
Export Programs and Incentives, net of FAS reimbursement expense		7,108,223.53	79.77
Export Cash-Back		92,704,784.95	1,041.11
All Administrative Expenses		1,244,094.00	13.99
		$ 110,812,968.31	$ 1,244.47
GROSS GROWER'S EQUITY		$ 1,403,712.84	$ 15.78

	GROWER'S EQUITY	BASED ON 50% RESERVE	BASED ON 100% DELIVERIES
GROSS GROWERS EQUITY	$ 1,403,712.84	$ 15.78	$ 4.73
LESS: PAYMENTS	0.00	0.00	0.00
LESS: STATE ADVERTISING ASSESSMENT	(1,403,712.84)	(15.78)	(4.73)
FINAL GROWER EQUITY	$ 0.00	$ 0.00	$ 0.00

RAISIN ADMINISTRATIVE COMMITTEE
STATEMENT OF DISPOSITION AND GROWER EQUITY
2002-03 NATURAL SEEDLESS RESERVE POOL
(NATURAL CONDITION WEIGHTS IN TONS)

THIS CHECK IS THE FINAL PAYMENT ON THE 2002-03 NATURAL SEEDLESS RESERVE POOL. A STATEMENT OF SALES, EXPENSES, GROWER'S EQUITY AND PRIOR PAYMENTS FOLLOWS:

RESERVE POOL SALES:

TONNAGE	SALES PRICE		GROSS SALES	PER RESERVE TON
34,199.0035	TONS @ $	835.00		
66,740.0000	TONS @	905.00		
6,083.1800	TONS @	1,215.00		
420.4500	TONS @	750.00		
19,583.0680	TONS @	700.00		
470.3400	TONS @	450.00		
15,299.3478	TONS @	305.00		
37,201.3748	TONS @	87.39197		
2,144.8088	TONS @	DONATIONS/OTHER		
182,117.6010	GROWER EQUITY BASE TONS		$ 118,280,586.99	$ 649.47
OTHER INCOME:				
	INTEREST EARNED		1,683,897.62	9.25
	BIN RENTAL INCOME		10,000.00	0.06
	MISCELLANEOUS INCOME		29,286.80	$ 0.16
			$ 120,004,160.41	$ 658.94
POOL EXPENSES ON POOL TONNAGE:				
Storage and Fumigation			9,969,084.60	54.74
Bin Rental - Deficiency			513,000.00	2.82
Raisin Insurance			127,068.20	0.70
Inspection Fees			1,658,208.81	9.11
Bin & Hauling Reimbursement			3,646,858.63	20.02
RAC Bins and Raisin Transfer Costs			183,287.94	1.01
Export Programs and Incentives, net of FAS reimbursement expense			5,383,343.25	29.55
Export Cash-Back			47,978,510.80	263.45
All Administrative Expenses			979,060.52	5.38
			$ 70,437,433.58	$ 386.78
RAC BIN EQUITY TRANSFERS:				
2001 Bin Repair Equity Transfer In			$ 102,802.14	$ 0.56
GROSS GROWER'S EQUITY			$ 49,669,618.67	$ 272.73

	GROWER'S EQUITY	BASED ON 47% RESERVE	BASED ON 100% DELIVERIES
GROSS GROWERS EQUITY	$ 49,669,618.67	$ 272.73	$ 128.18
PRIOR PAYMENTS	37,334,108.56	205.00	96.53
FINAL PAYMENT (Before State Advertising)	$ 12,335,510.91	$ 67.73	$ 31.80
STATE ADVERTISING ASSESSMENT	$ 1,686,496.64	$ 9.23	$ 4.36
NET CASH PAYMENT PER TON ON 100%			$ 27.45

2a

Supreme Court, U.S.
FILED
OCT 8 - 2014
OFFICE OF THE CLERK

No. 14-275

In the Supreme Court of the United States

MARVIN D. HORNE, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE CATO INSTITUTE, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, CENTER FOR CONSTITUTIONAL JURISPRUDENCE, INSTITUTE FOR JUSTICE, REASON FOUNDATION, AND SOUTHEASTERN LEGAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the government's "categorical duty" under the Fifth Amendment to pay just compensation when it "physically takes possession of an interest in property," *Arkansas Game & Fish Comm'n* v. *United States*, 133 S. Ct. 511, 518 (2012), applies only to real property and not to personal property.

2. Whether the government may avoid the categorical duty to pay just compensation for a physical taking of property by reserving to the property owner a contingent interest in a portion of the value of the property, set at the government's discretion.

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Why does America regulate the trade in raisins?, The Economist (Apr. 14, 2013), available at http://econ.st/1C60qXK 6

INTRODUCTION AND INTEREST OF *AMICI CURIAE*

Amici are advocates for individual freedom who regard the right to keep and control one's own property as among the most vital rights in any free society and the most basic rights protected by the Constitution. See Appendix A. Four of the *amici* participated in this case in its previous iteration, when this Court unanimously rebuffed the government's attempt to make property owners sue twice—once in federal district court and once in the Court of Claims—to vindicate their property rights.

The case is here again, this time because the Ninth Circuit has wrought a major upheaval of basic principles of takings law. The seeds of this case were sown in 1949, when the Department of Agriculture established a Raisin Marketing Order, ostensibly to smooth market fluctuations. The government's scheme conscripts raisin "handlers" to convey title to a quota of "producers'" raisins to its Raisin Administrative Committee. This Committee then has unbridled discretion over the fate of its spoils. It can sell the raisins for profit, ship them to another public agency, or even give them to foreign countries.

Meanwhile, the handler must "hold in storage" the raisins "for the account of the committee" "until he has been relieved of such responsibility." 7 C.F.R. §§ 989.66-67. Once the Committee disposes of the

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* Pursuant to Rule 37.2(a), *amici* provided timely notice of their intention to file this brief. All parties have consented. In accordance with Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity other than the *amici* has made a monetary contribution to the preparation or submission of this brief.

raisins, hands out export subsidies to its preferred processors, and covers its administrative costs, it might have funds remaining to disburse to the farmers whose raisins were taken and who retained a contingent interest in those proceeds.

Or it might not. In 2003-2004, petitioners, the Hornes, turned over 306 tons of raisins—30% of their crop—to USDA; in return, they received *nothing*. Pet. App. 41a. The year before, when they turned over nearly half of their raisins, they received far less than their cost of production. Pet. 6-7. Thus, a New Deal program whose raison d'être was to lift prices above "the cost of production" (Pet. App. 4a) now forces raisin farmers to fork over the fruits of their labor with no hope of even covering their expenses. Year in and year out, the Committee takes farmers' crops without providing just—or sometimes any—compensation.

The Ninth Circuit nevertheless upheld the government's scheme, on two grounds. First, the court departed from this Court's precedent and squarely split with six other circuits by drawing an artificial distinction between real and personal property. Under the per se rule of *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), any physical confiscation of property has always required just compensation. But according to the Ninth Circuit, the mere fact that the property here is "personal," not "real," immunizes the taking from *Loretto*'s reach.

The Takings Clause, however, makes no distinction between "real" and "personal" property—it states categorically that "private property" shall not "be taken for public use, without just compensation." U.S. Const. amend. V. Nor did *Loretto* rest on any

such distinction. It held that, where the government "effectively destroys *each*" of one's "[p]roperty rights in a physical thing"—"the rights 'to possess, use and dispose of'" the property—this Court's "cases uniformly have found a taking." 458 U.S. at 435, 434.

But the Ninth Circuit's distinction not only conflicts with the constitutional text and this Court's precedents. It also lacks any economic basis and favors landowners over those who lack the means to buy real estate. The Hornes lost all right to possess, use, and dispose of their own property. It is constitutionally irrelevant that the property is a ton of raisins grown on their farm, rather than the farm itself.

Second, the decision below authorizes the government to flout its constitutional obligation to provide just compensation merely by providing a future, contingent interest that may well prove worthless. By the Ninth Circuit's lights, *Loretto*'s per se rule is inapplicable whenever the government's scheme preserves the theoretical possibility of a payout from the government's use of the taken property—even if, as here, the payout never materializes or it amounts to less than the owners' cost of producing the property in the first place. The court justified this result on the ground that the property owners share in the public benefits supposedly produced by the taking, effectively reducing the Takings Clause to a form of rational-basis-style "legitimate purpose" review.

By permitting the government to avoid *Loretto*'s per se rule merely by offering a contingent interest that could be utterly worthless, the Ninth Circuit opened the door to procedural gamesmanship that threatens to send property rights the way of the California Raisins. The court found it persuasive that the

government scheme was "carefully crafted to ensure the [owners] are not completely divested of their property rights" in the sense that they retain the right to an "equitable distribution," albeit one that "may be zero." Pet. App. 18a, 21a. But this mistakes the problem for the solution. *Any* government action can be joined with some trivial, contingent right. Surely the government may not seize our cars to deliver the mail and avoid paying just compensation by allowing us to use them on Sundays.

Nor, obviously, is the fact that mail would be delivered to our homes Monday through Saturday—our bit of the public benefit—sufficient to avoid a per se taking. Yet that is exactly what the Ninth Circuit held in ruling that the Hornes' enjoyment of the supposed benefits of collectivization is a "contingent interest" sufficient to avoid *Loretto*.

By devaluing property rights of all sorts, the Ninth Circuit's approach weakens the values of autonomy and reliance that undergird the Takings Clause and our constitutional order. James Madison could have been speaking directly to the court below when he admonished: "Government is instituted to protect property *of every sort*," and "the end of government * * * is a *just* government, which *impartially* secures to every man, whatever is his *own*." James Madison, *Property*, Nat'l Gazette, Mar. 29, 1792, reprinted in 14 The Papers of James Madison 266 (Robert A. Rutland et al. eds., 1983) (first emphasis added).

The Ninth Circuit's decision radically shrivels the right to own property—in a manner that conflicts with the precedents of this Court and numerous cir-

cuits, the nation's founding ideals, and the Constitution. Certiorari should be granted.

STATEMENT

1. Much-criticized relics of the New Deal, agricultural marketing orders administered by the United States Department of Agriculture (USDA) continue to tightly control the supply of many agricultural products today. In theory, these orders are designed to prevent "unreasonable fluctuations in supplies and prices." 7 U.S.C. § 602(4). In reality, the orders create government-enforced cartels that give bureaucrats carte blanche both to fine farmers who sell more than their allotted quotas and to drive up prices for consumers. See generally Thomas M. Lenard & Michael P. Mazur, *Harvest of Waste: The Marketing Order Program*, Regulation, May/June 1985.[1]

2. This case involves the USDA's marketing order for raisins, which "effects a direct transfer of title of a producer's 'reserve tonnage' raisins to the government." *Evans* v. *United States*, 74 Fed. Cl. 554, 558 (2006). Under that order, handlers of raisins must reserve a certain portion of the producers' crop, which they may not sell on the open market. USDA annually establishes the amount to be reserved, based on the recommendations of a committee of 46 industry representatives and *one* representative of the public. 7 C.F.R. §§ 989.26, 989.29-30, 989.35-36.

The reserve-tonnage raisins must be physically segregated from the rest of the farmer's crop and held "for the account" of the Committee, which takes title. *Id.* §§ 989.65, 989.66(a), (b)(1), (b)(2), (g). After the Committee disposes of the raisins and covers its ex-

[1] Available at www.cato.org/pubs/regulation/regv9n3/v9n3-4.pdf.

penses, "[w]hatever net income remains [if any] is disbursed to" the farmers who grew the raisins and were forced to turn them over. Pet. App. 6a (citing 7 C.F.R. § 989.66(h)).

The Committee's central planning has been less than stellar. After "allegations that members of the Raisin Administrative Committee engaged in illegal price-fixing and market division discussions with foreign producers," the USDA amended the marketing order to prohibit such conduct. Daniel Bensing, *The Promulgation and Implementation of Federal Marketing Orders Regulating Fruit and Vegetable Crops Under the Agricultural Marketing Agreement Act of 1937*, 5 San Joaquin Agric. L. Rev. 3, 20 (1995). The Committee does consumers no favors either: its creation of "artificial raisin-scarcity * * * drives up prices," with the paradoxical result "that Californian raisins are sometimes cheaper abroad than they are in California." *Why does America regulate the trade in raisins?*, The Economist (Apr. 14, 2013).[2]

3. The Hornes are farmers in Fresno and Madera Counties. During the relevant years, 2002-2003 and 2003-2004, the Hornes did not set aside the mandated reserve-tonnage raisins. As they explained to the Committee, they believed they had a "right[] under the Constitution" not to "relinquish ownership of [their] crop" to the government. Pet. App. 129a-130a. The government disagreed. It initiated an administrative enforcement action against the Hornes, and the USDA ultimately found them liable for failing to give up their raisins. Pet. App. 8a.

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[2] Available at http://econ.st/1C60qXK.

4. The Hornes sought relief in federal court. Pet. App. 8a. After the district court granted summary judgment to the USDA, the Hornes appealed to the Ninth Circuit, which initially held that no taking had occurred because the marketing order "applies to the Hornes only insofar as they voluntarily choose to send their raisins into the stream of interstate commerce." Pet. App. 208a. But when the Hornes sought rehearing, the Ninth Circuit changed its tune, deciding it lacked jurisdiction over the takings issue.

This Court unanimously reversed. Pet. App. 258a. As the Court held, "it is clear that the Government has both taken property *and* denied just compensation," which permits the Hornes to bring a Fifth Amendment claim. Pet. App. 254a (emphasis added). The Court remanded the case so that, as Justice Kagan put it, the Ninth Circuit could "figure out whether this marketing order is a taking or * * * just the world's most outdated law." Transcript of Oral Argument 49, *Horne* v. *Dep't of Agric.*, 133 S. Ct. 2053 (2013) (No. 12-123).

5. On remand, the same panel again ruled that the Committee's seizure of the raisins is not a compensable taking. The court cited two reasons—neither of them advanced by the government—why the per se rule requiring compensation for physical confiscations of property does not apply.

First, "the Marketing Order operates on personal, rather than real property," and "the Takings Clause affords less protection to personal than to real property." Pet. App. 18a. Second, the Hornes retain a "contingent interest" in the proceeds from their raisins, so they "are not completely divested of their property rights." *Ibid.*

The panel acknowledged that "the equitable distribution" from the Committee "may be zero," but it "is not zero in every year" (Pet. App. 21a)—at least, not for those who participate year after year. Even when it is, that is only because "it just so happens that in those years" the Committee's "gross proceeds are not greater than [its] operating expenses." *Ibid.* In any event, the taken raisins "continue to work to the Hornes' benefit" because USDA uses them "to stabilize market conditions." Pet. App. 21a-22a.

REASONS FOR GRANTING THE WRIT

I. In conflict with decisions of this Court and other circuits, the Ninth Circuit wrongly limited *Loretto* to real property.

Where the government effects "a permanent physical occupation of property," this Court's "cases uniformly have found a taking." *Loretto*, 458 U.S. at 434. Here, the government "effectively destroy[ed] *each*" of the Hornes' "[p]roperty rights in a physical thing"—"the rights 'to possess, use and dispose of" their raisins. *Id.* at 435. But in conflict with the decisions of this Court and other circuits, the Ninth Circuit held that *Loretto* does not govern "controversies involving personal property." Pet. App. 20a. Review is needed.

A. The Ninth Circuit relied on inapposite dicta and contradicted this Court's explicit recognition that *Loretto* applies to personal property.

1. This Court has never held that *Loretto*'s per se rule is limited to real property. *Loretto* itself certainly states no such rule: As the Ninth Circuit admitted, "the *Loretto* Court did not have occasion to consider the occupation of personal property." Pet. App. 20a. In fact, "the actual holding of *Loretto* makes no men-

tion of a distinction between real and personal property, nor was any rationale given in the opinion that might justify such a distinction." *Nixon* v. *United States*, 978 F.2d 1269, 1284 (D.C. Cir. 1992).

To support its distinction between real and personal property, the Ninth Circuit thus relied instead on a "later discussion of personal property in *Lucas*," where this Court observed in dictum that, "'in the case of personal property,'" the government has a "'traditionally high degree of control.'" Pet. App. 18a-20a (quoting *Lucas* v. *S.C. Coastal Council*, 505 U.S. 1003, 1027-1028 (1992)). This passage, the court reasoned, shows that there is "no reason to extend *Loretto* to govern controversies involving personal property." Pet. App. 20a. The court below was mistaken.

First, *Lucas* did *not* involve a "physical invasion" of property (505 U.S. at 1015)—the type of taking at issue here and in *Loretto*. USDA wishes to physically take possession of the Hornes' raisins. *Lucas*, by contrast, dealt with the distinct situation "where regulation denies all economically beneficial or productive use of land." *Ibid.* The Marketing Order does not merely diminish the value of the Hornes' property, or foreclose certain uses thereof. Rather, the government has *outright taken title* to that property for a public use while refusing to pay for it.

Put simply, regulatory-taking rules are irrelevant. The panel's treatment of a "regulatory taking" case like *Lucas* as "controlling" in a "case[] involving physical takings" ignored a "longstanding distinction" between the two and was "inappropriate." *Tahoe-Sierra Preservation Council* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302, 323-324 (2002) (internal quotation marks omitted); Pet. 25-26.

Second, this Court has already recognized that *Loretto does* apply to personal property. A decade after *Lucas*, the Court analyzed the government's forced "transfer of the interest" in lawyers' trust accounts—*personal* property—under the "*per se* approach," finding that it was "akin to the occupation" of property "in *Loretto*." *Brown* v. *Legal Found. of Wash.*, 538 U.S. 216, 235 (2003) (citing *Phillips* v. *Wash. Legal Found.*, 524 U.S. 156, 172 (1998)).

By ignoring and contradicting *Brown*, the Ninth Circuit parted company with six other circuits (see *infra* at 11-12) and rendered a highly destabilizing decision. If intangible and fungible property like earned interest on a trust fund is subject to *Loretto*'s categorical rule, then surely "physical thing[s]" like raisins—which can literally be "possess[ed], use[d] and dispose[d] of"—fall under its protection. *Loretto*, 458 U.S. at 435 (internal quotation marks omitted). Indeed, such "physical appropriations * * * represent a *greater* affront to individual property rights." *Tahoe-Sierra*, 535 U.S. at 324 (emphasis added).

2. Remarkably, not only did the Ninth Circuit ignore *this* Court's logic in *Brown*, it quoted its *own* contrary reasoning from the same case: "'[t]he per se analysis has not typically been employed outside the context of real property.'" Pet. App. 20a (quoting *Wash. Legal Found.* v. *Legal Found. of Wash.*, 271 F.3d 835, 854 (9th Cir. 2001) ("*WLF*") (en banc), *aff'd sub nom.*, *Brown*, 538 U.S. 216). The panel neglected that, although this Court affirmed the *judgment* in *Brown*, it *rejected* the Ninth Circuit's takings analysis. This Court "agree[d]" with "the *dissenters*," who "likened" the government's confiscation of earned interest "to the kind of '*per se*' taking that occurred in *Loretto*." *Brown*, 538 U.S. at 235 (emphasis added).

As those dissenters recognized, the "argu[ment] that the per se approach of *Loretto* and similar cases applies primarily to takings of real property * * * is not true." 271 F.3d at 866 (Kozinski, J., dissenting). After all, "if the city wants to display your Renoir in its museum, it can't just take it and compensate you with the joy of viewing it during visiting hours." *Ibid.* For raisin farmers in California, the deal is even worse. If the Ninth Circuit is right, the government can take your Renoir, send it back to France, and, after pocketing the change to cover its own budget, give you absolutely nothing.

That dangerous reasoning is an affront to this Court's precedent, to the decisions of six other circuits, and to the ideals of private property on which the nation was founded. Review is warranted.

B. Review is needed to resolve the circuit split on this recurring issue—a split that includes the Federal Circuit, which hears more takings cases than any other circuit.

As petitioners show (Pet. 18-19), the Ninth Circuit's erroneous holding that government confiscation of personal property is never subject to *Loretto*'s per se rule split with the Fifth, Sixth, Seventh, Tenth, and D.C. Circuits. Pet. 18-19.[3] Critically, however,

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[3] See *Nixon*, 978 F.2d at 1284 (rejecting the "argu[ment] that the per se takings doctrine applies only to * * * real property" as "fail[ing] for want of authority or logic"); *Warner/Elektra/Atl. Corp.* v. *Cnty. of DuPage*, 991 F.2d 1280, 1285 (7th Cir. 1993) ("American governments" "have to pay just compensation" when they "requisition personal property"); *Anderson* v. *Spear*, 356 F.3d 651, 668-669 (6th Cir. 2004) (state's "disgorgement" of campaign funds "constitutes a *per se* taking"); *Porter* v. *United States*, 473 F.2d 1329, 1333 (5th Cir. 1973) (per se test applied to "commonplace items of personal property"); *United States* v.

that holding also split with the Federal Circuit, which has exclusive jurisdiction over appeals from the Court of Claims and "hears more takings cases than any other federal court." Tedra Fox, *Lake Tahoe's Temporary Development Moratorium*, 28 Ecology L.Q. 399, 426 (2001).

The Federal Circuit has "rejected the * * * contention that a 'per se' takings analysis is never applicable when personal property is at issue." *Rose Acre Farms, Inc.* v. *United States*, 373 F.3d 1177, 1196 & n.17 (Fed. Cir. 2004). As that court has recognized, government confiscation of personal property is "akin to the 'per se' taking that occurred in *Loretto*." *Id.* at 1196 n.17 (citing *Brown*, 538 U.S. at 235).

The Ninth Circuit held the exact opposite, yet failed even to mention, much less distinguish, any of these contrary authorities. And while other circuits have recognized the proper scope of the Takings Clause, that is cold comfort to farmers in the Ninth Circuit—by far the nation's largest jurisdiction—who will remain at the mercy of government cartels. This Court alone can protect them.

C. There is no principled distinction between government confiscation of real and personal property.

It is no wonder that—unlike the Ninth Circuit—most courts have decided that the Takings Clause applies to confiscations of land and personal property alike. Economically, distinguishing between real and personal property makes no sense. Regardless of the property's uniqueness or "sentimental value," only

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Corbin, 423 F.2d 821, 826 (10th Cir. 1970) (per se test applied where "the Government took possession of * * * fish").

the "market value" of taken property is compensable. *WLF*, 271 F.3d at 866 (Kozinski, J., dissenting). "For purposes of the Takings Clause," therefore, both "real and personal property are reduced to their cash equivalents." *Ibid.*

That value, moreover, is measured exactly the same way for real property as it is for personal property. "[T]en acres of undeveloped land in rural Maine is not as valuable as ten acres of undeveloped land in midtown Manhattan," because "people are willing to pay a higher price for access to Manhattan." *Philip Morris, Inc.* v. *Reilly*, 312 F.3d 24, 51 (1st Cir. 2002) (Selya, J., concurring). If land itself had some special significance, "these tracts of equal size and topographical characteristics [w]ould be worth the same." *Ibid.* But no one pretends that they are, or that land is any less commercialized or fungible than any other property. "Limiting per se takings analysis to cases involving real property is" thus "a crude boundary with no compelling basis" in economics or "the law." *Ibid.*

Unfortunately, the Ninth Circuit's unprecedented view of the Takings Clause "will doubtless be greeted with a rousing cheer by government officials who will eagerly" seize personal property—including "bank accounts and other places where money is kept"—all while easily "justifying it with some sort of 'ad hoc' analysis." *WLF*, 271 F.3d at 866 (Kozinski, J., dissenting). Review is urgently needed.

II. The Ninth Circuit's approach would encourage the government to engage in procedural gamesmanship to avoid *Loretto*'s per se takings rule.

Apart from its artificial distinction between real and personal property, the Ninth Circuit refused to apply *Loretto* because "the Hornes retain the right to the proceeds from" the Committee's disposition of the raisins, so their "rights with respect to the reserved raisins are not extinguished." Pet. App. 21a. True, "the equitable distribution may be zero," but that is only because "it just so happens that in those years" the Committee has no net revenue. *Ibid.* Thus, the Ninth Circuit held, "the Hornes did not lose all economically valuable use of" their raisins, and *Loretto* does not apply. Pet. App. 20a. Instead, because the Hornes retained some "residual value after the regulation's application," the court applied "the ad hoc framework" of *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104 (1978). Pet. App. 22a n.17, 16a.

Permitting the decision below to stand would have negative consequences for all types of property rights. The Ninth Circuit's rationale extends to confiscations of both personal and real property. It would allow the government to avoid *Loretto* simply by giving inadequate—or purely theoretical—compensation to those whose property is taken. Just as problematic, the decision below counts the claimed benefits that purportedly flow from the government's use of the taken property as an adequate contingent interest. That cannot be the law. If it were, it would undermine core property rights and lead to the vast majority of takings being analyzed only under *Penn Central*'s highly deferential balancing test.

A. Under the Ninth Circuit's rule, the government could manipulate the standard of review by offering an illusory contingent interest.

According to the Ninth Circuit, the government may avoid paying just compensation simply by giving property owners some contingent interest in their taken property. Under its decision, the per se takings rule would collapse; it would apply only when a particularly uncreative government body forgets to provide the property owner a meaningless remainder interest. After all, every regulation could easily be, in the Ninth Circuit's words, "carefully crafted to ensure the [property owners] are not completely divested of their property rights"—especially if it is quite alright that "the equitable distribution" from the interest "may be zero." Pet. App. 18a, 21a.

The dangers of this Kafkaesque rule extend to all types of property. The Ninth Circuit considered its imaginary contingent interest rationale for avoiding *Loretto* "independent" from its mistaken distinction between real and personal property. Pet. App. 17a. Thus, a government seeking to build a new highway through private property might avoid the per se rule by leaving the property owners a contingent interest in highway funds—just as the Post Office, desiring to seize vehicles for mail delivery, might avoid that rule by leaving the vehicles' owners a contingent interest in mail-related revenues. And since the government can decide the scope of the contingent interest, there is every reason to expect that the interest will, as the Ninth Circuit says, "just so happen[]" to be worthless. Pet. App. 21a.

Were the Ninth Circuit's destructive rule correct, this Court's past takings cases should have come out the other way. The seizure of coal mines in *United States* v. *Pewee Coal Co.* would not have required the government "to pay just compensation," had it simply reserved to the mine's former owner a theoretical interest in the mine's production. 341 U.S. 114, 117 (1951) (plurality). And the disruptive flights directly over a home and farm in *United States* v. *Causby* could have been "balanced" into a non-compensable taking if only the government had offered a token portion of airport net revenues to the homeowner. 328 U.S. 256, 265 (1946). In short, the Ninth Circuit's approach would, apart from the rarest example of a government forgetting to reserve a parchment interest, eviscerate the per se takings rules.

B. The Ninth Circuit's decision permits the government to avoid the per se rule merely by characterizing diffuse public benefits as "contingent interests."

Permitting governments to manipulate the standard of review by leaving the property owner a meaningless contingent interest is bad enough. But the Ninth Circuit went further. By its lights, *Loretto*'s per se rule does not apply because "even in years in which producers receive no equitable distribution," the Hornes' interest "funds the administration of an industry committee" that allegedly "ensures the reserved raisins continue to work to the Hornes' benefit after they are diverted to the" Committee. Pet. App. 21a-22a. The Committee uses the funds from the Hornes' property to "represent[] raisin producers" and supposedly "stabilize the field price of raisins." Pet.

App. 21a.[4] In other words, because the government knows how to use raisins better than the Hornes do (if only they understood!), the Hornes have a continuing contingent interest sufficient to avoid the per se rule. Once again, this collectivist view of property is foreign to the Fifth Amendment.

It is no exaggeration to say that, if this view became law, the following scheme would be judged, not under *Loretto*, but only under *Penn Central*'s far weaker balancing test: The government forms a Land Administrative Committee, which has the power to take 50 percent of all real property and direct its use. The (former) property owners must keep the land "for the account" of the Committee. The owners receive no compensation. Instead, the government puts the land to a "better" use and provides, say, lower taxes, or some other diffuse public benefit to the owners (accepted as true in court on the government's say-so). Under the Ninth Circuit's view, this is not a per se taking.

That cannot be right. As the Hornes put it, farmers may not lawfully be required to "relinquish ownership of [their] crop"—they "put forth the money and effort to grow it, not the Raisin Administrative Committee. This is America, not a communist state." April 23, 2002 Letter from the Hornes to the Secretary of Agriculture and the Raisin Administrative Committee (Pet. App. 129a-130a).

Of course, one need not collectivize half the private property in America to see the flaws of the Ninth

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[4] All these "benefits" with "no federal funding," says the Ninth Circuit (Pet. App. 6a)—as if this scheme were *more* constitutional because it runs on confiscated property rather than taxes.

Circuit's approach. Take *Loretto* itself. This Court found a per se taking because there was "a permanent physical occupation of property." *Loretto*, 458 U.S. at 441. But if the Ninth Circuit were right, the government could easily have manipulated the applicable standard, avoiding the per se rule. All it needed to do was tell the Court that, even if the property owners were too obtuse to realize it, they "benefited" from the government taking their property to install cable by the improvement of the nationwide communications system, the resulting increase in educational and entertainment programming, and ultimately a richer cultural milieu. Thus, the "disposition" of the owners' property "inure[d] to [their] benefit." Pet. App. 22a.

Indeed, such arguments could be made for any taking. For instance, "even the family that gets booted from its home to make room for a freeway will get the benefit of a much faster commute from the park bench whence it must take up residence." *WLF*, 271 F.3d at 866 (Kozinski, J., dissenting). "In a complex world, a property owner will always get *some* benefit, real or theoretical, from a taking of his property." *Ibid.*

In fact, such an argument was made in *Loretto*—and rejected. As the Court explained, even if the taking "serve[d] the legitimate public purpose of 'rapid development of and maximum penetration by a means of communication which has important educational and community aspects,'" that "is a separate question" from whether a taking occurred. *Loretto*, 458 U.S. at 425. "[A] permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." *Id.* at 426.

If the ruling below is right, then *Loretto* is wrong. Indeed, many of this Court's taking cases must be wrong. "[T]he physical taking of *any* property by the government * * * is a compensable taking, even if the property owner gets an offsetting—or even a net—benefit." *WLF*, 271 F.3d at 866 (Kozinski, J., dissenting). As Justice Holmes put it long ago: "[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pa. Coal Co.* v. *Mahon*, 260 U.S. 393, 416 (1922).

C. Evisceration of the per se takings rule would undermine property ownership, autonomy, and reliance interests.

1. By making it easy for governments to avoid the per se takings rule, the decision below would undermine the foundational values of American property law. The Fifth Amendment embodies the principle that property rights are central to a free people and a just government. Property cannot be taken without "due process"; and when it is taken, the government must pay "just compensation." U.S. Const. amend. V.

These guarantees reflect the many values inherent in private property. They promote individual achievement, privacy, and autonomy from government intrusion. *Loretto*, 458 U.S. at 436 ("[P]roperty law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property."). They also protect settled expectations and reliance interests. Moreover, they foster equal treatment under the law by barring the government "from forcing some people alone to bear public burdens which, in all fairness and justice,

should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960). But under the Ninth Circuit's decision, most takings would be assessed only under the malleable *Penn Central* standard. Applying that standard writ large would provide scant protection to core property rights.

As this Court has recognized, "[t]he traditional rule" embodied by *Loretto* "avoids otherwise difficult line-drawing problems." *Loretto*, 458 U.S. at 436. Since *Penn Central*, the Court has expressed discontent with that decision's "'essentially ad hoc, factual inquir[y].'" *Koontz* v. *St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2600 (2013) (quoting *Penn Central*, 438 U.S. at 124). In *Koontz*, the Court declined to apply, "much less extend that 'already difficult and uncertain rule'" to a monetary exaction. *Ibid.* (quoting *E. Enters.* v. *Apfel*, 524 U.S. 498, 542 (1998) (Kennedy, J., concurring in the judgment and dissenting in part)). Indeed, the question of when a taking occurs under *Penn Central* is "among the most litigated and perplexing in current law." *E. Enters.*, 524 U.S. at 542 (Kennedy, J.).

2. The central weakness in *Penn Central*'s three-factor balancing test is that it is readily susceptible to manipulation. Whether a taking occurs depends on a balancing of: (1) the regulation's "economic impact" on the property owner; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action." 438 U.S. at 124. Those factors are incapable of consistent application—and should not be extended beyond regulatory takings, to actual physical takings.

The first factor examines the economic impact on the property owner. Which way this factor points depends on how the impact is characterized. A court sympathetic to a taking can easily invoke the "bundle of rights" concept and frame the taking as one that removes only a couple twigs from the bundle—as the Ninth Circuit did here. Pet. App. 18a, 20a; see Eric R. Claeys, *The* Penn Central *Test and Tensions in Liberal Property Theory*, 30 Harv. Envtl. L. Rev. 339, 357 (2006). By contrast, courts less sympathetic to the government can "construe[] the owners' interest much more broadly," often by characterizing the right taken as one of the bundle's more significant sticks. *Id.* at 361.

The second factor focuses on "investment-backed expectations." But this phrase obscures more than it illuminates. As Professor Richard Epstein has observed, "we should be deeply suspicious of the phrase 'investment-backed expectations' because it is not possible to identify even the paradigmatic case of its use." Richard A. Epstein, Lucas *v.* South Carolina Coastal Council*:* *A Tangled Web of Expectations*, 45 Stan. L. Rev. 1369, 1370 (1993). If the phrase is supposed "to convey the idea that property is protected only where it has been acquired by purchase or labor, then it is clearly inaccurate": "The government cannot take property from a donee anymore than it can take it from a buyer." *Ibid.* Of course, this factor can swing either way depending on whether the court chooses to frame the property interest in commercial terms.

The third factor, the character of the government action, is likewise unpredictable and easily manipulated. If a court characterizes the government action "by focusing on the invasiveness of the regulation,"

this factor will point toward a taking. Claeys, *supra*, at 357. But if the court "tak[es] at face value the purposes for which the government professed to act" and gives these purposes "close to rational-basis deference," this factor will point the other way. *Ibid.* "Whether one or the other of the competing characterizations will come to one's lips in a particular case depends primarily upon one's evaluation of the worth of competing uses of real estate." *Lucas*, 505 U.S. at 1025.

3. *Penn Central*'s malleability erodes the values served by the protection of private property, creating uncertainty at the public's expense. Citizens "will not be able to make informed choices" about their property if the Court does not apply "clear standards to determine when compensation will be paid." Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 Colum. L. Rev. 1697, 1700 (1988). Because the Takings Clause "is an attempt to reconcile an unpredictable, democratically responsible polity with the existence of a capitalist economy based on private property and individual initiative," ad hoc takings rules "introduce[] an element of uncertainty into private investment decisions that could make the coexistence of democracy and private property more, rather than less, difficult." *Id.* at 1701-1702.

Further, unpredictable standards tend to destroy "the appearance of equal treatment." Antonin Scalia, *The Rule of Law As A Law of Rules*, 56 U. Chi. L. Rev. 1175, 1178 (1989). Because *Penn Central*, "with its lack of objective criteria, does not impart knowledge of the legal rights and obligations of either property owners or public officials," its application has "result[ed] in protracted litigation and arbitrary outcomes." Steven J. Eagle, *The Four-Factor* Penn

Central *Regulatory Takings Test*, 118 Penn St. L. Rev. 601, 605 (2014).

The per se framework produces fairer and more predictable results than *Penn Central*, and it should be generally favored by the law. Yet, under the decision below, the per se rule would rarely apply. Whenever the government offered some contingent interest in the taken property—even if that interest was worthless or had value only in the government's eyes—there would never be a per se taking. Instead, *Penn Central* would apply, permitting property rights of all sorts to be "balanced" away. To preserve the core protection of the Takings Clause, the Ninth Circuit's decision must be reviewed and reversed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2014

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APPENDIX

APPENDIX A: LIST OF *AMICI CURIAE*

The *Cato Institute* was established in 1977 as a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs, including in various cases concerning property rights. This case is of central concern to Cato because it implicates the safeguards the Constitution provides for the protection of property rights against wrongful takings.

The *National Federation of Independent Business* (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents about 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

The *National Federation of Independent Business Small Business Legal Center* (NFIB Legal Center) is a nonprofit, public interest law firm established to

provide legal resources and be the voice for small businesses in the nation's courts on issues of public interest affecting small businesses. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs in cases that will impact small businesses.

The *Center for Constitutional Jurisprudence* is the public interest law arm of the Claremont Institute, the mission of which is to restore the principles of the American Founding to their rightful and preeminent authority in our national life, including the proposition expressed in the Fifth Amendment that private property can be taken only for public use, and then only upon payment of just compensation. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as *amicus curiae* before this Court in several cases of constitutional significance, including *Kelo* v. *City of New London, Connecticut*, 545 U.S. 469 (2005), and *Rapanos* v. *United States*, 547 U.S. 715 (2006).

The *Institute for Justice* is a nonprofit, public interest law center committed to defending the essential foundations of a free society through securing greater protection for individual liberty and restoring constitutional limits on the power of government. Central to the mission of the Institute is strengthening the ability of individuals to control and transfer property and demonstrating that property rights are inextricably connected to other civil rights.

The *Reason Foundation* is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to advance a free society by developing, applying, and promoting libertarian principles and policies—including free markets, indi-

vidual liberty, and the rule of law. Reason supports dynamic market-based public policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing *Reason* magazine, as well as commentary on its websites, *www.reason.com* and *www.reason.tv*, and by issuing policy research reports. To further Reason's commitment to "Free Minds and Free Markets," Reason selectively participates as *amicus curiae* in cases raising significant constitutional issues.

Southeastern Legal Foundation (SLF), founded in 1976, is a national non-profit, public interest law firm and policy center that promotes the public interest in the proper construction and enforcement of the laws and Constitution of the United States in the courts of law and through public discourse. SLF advocates constitutional individual liberties, private property rights, limited government, and the free enterprise system in its litigation cases and *amicus* participation in state and federal courts.

Supreme Court, U.S.
FILED
OCT - 8 2014
OFFICE OF THE CLERK

No. 14-275

In the Supreme Court of the United States

MARVIN D. HORNE, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1912, the Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents an underlying membership of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the county. More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees. The Chamber represents the interests of its members in matters before Congress, the Executive Branch, and the courts.

The Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the Nation's business community, including cases defending constitutional protections for private property rights against government infringement. The Chamber filed briefs *amicus curiae* supporting property owners when this case was last before this Court as *Horne* v. *Dep't of Agriculture*, No. 12-123, leading to a unanimous reversal of the Ninth Circuit's prior judgment, and also in *Koontz* v. *St. Johns River Water Management District*, No. 11-1447, which

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[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, and its counsel made any monetary contribution to its preparation and submission. The parties have consented to this filing, with timely notice from *amicus* of its intent to file.

resulted in a property-rights-protective ruling that supports petitioners in this case.

On remand from its prior reversal in this Court, the Ninth Circuit again sharply departed from this Court's longstanding takings jurisprudence, adopting a dangerous new test that guts property rights protections. The decision is of grave practical concern to the Chamber and its members, which have a substantial interest in ensuring that property owners retain an adequate, efficient, and prompt remedy against government takings of real and personal property. Historically, the property rights of Chamber members have been subject to infringement in a wide range of areas, including through laws, like those at issue here, which impose monetary fines or penalties as a proxy for outright physical appropriation of private property.

The Ninth Circuit held here that a federal law requiring petitioners to transfer title to the government of a substantial portion of their annual raisin crop—or face a fine, including an amount equal to the value of the raisins which the government demanded be handed over—was not a categorical "taking," and thus was protected under the Fifth Amendment, if at all, only by the "nexus and rough proportionality" standard formerly limited to land-use exactions, or the general ad hoc regulatory takings doctrine. Adding insult to injury, the panel sought to defend its rule by suggesting that petitioners could avoid the expropriation simply by abandoning the market and their life-long vocation by producing something other than raisins. The Ninth Circuit's radical decision creates significant doctrinal confusion and substantially weakens Fifth

Amendment rights, with wide-ranging consequences for business interests and private property holders nationwide.

SUMMARY OF ARGUMENT

The panel decision improperly conflates the categorical framework long applicable to permanent physical occupations of property with the more fact-intensive analysis used for regulatory takings—including a balancing test that this Court has traditionally reserved for land-use exactions. In particular, the panel's holding that *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), is inapplicable when the government appropriates personal property represents a dangerous retreat from a bright-line rule that has long served as an important bulwark for property rights, and conflicts with the weight of this Court's and lower-court authority.

The panel decision threatens private property rights in a broad range of contexts, and creates dangerous incentives for the government to disguise traditional takings in an effort to reframe the governing legal analysis and exploit the loophole created by the panel's novel doctrinal approach. Personal property is no less at risk of government interference—and thus no less deserving of the certainty and predictability provided by a per se rule for physical takings—than real property. Case reporters are replete with examples of the government appropriating personal property, illustrating the diverse forms of interference with, and abuse of, property rights that the panel decision effectively green-lights.

The panel decision also creates numerous conflicts of authority by holding that *Loretto* is inapplicable to personal property, that just compensation is not required where a property owner retains some theoretical right to proceeds from the property or benefit from a regulatory scheme, and that a permanent physical occupation can be reframed as a mere "use restriction."

The Chamber and its members have grave concerns about the panel's "use restriction" theory, in particular, which amounts to the unprecedented and indefensible notion that the government can condition a property owner's ability to sell goods into the market on its agreement to transfer title over a significant fraction of its property to the government. That dangerous idea is anathema to bedrock principles of private property rights, and admits to no principled limitation. Even absent the conflicts of authority generated by the panel's decision, this Court's review would be urgently warranted—to reaffirm that a taking occurs whenever the government physically occupies or appropriates private property, and to avert dire effects on business interests and private property rights nationwide by inviting governments to reframe appropriations as mere "use restrictions."

ARGUMENT

I. Diluting The Per Se Physical Takings Doctrine Will Have Serious Negative Effects On Property Rights Nationwide

As petitioners explain, the panel erred, and departed from the approach of numerous other

courts, by holding that: (1) the government's appropriation of a portion of petitioners' raisin crop does not constitute a per se physical taking of private property under *Loretto*; (2) there was no per se taking because petitioners purportedly retained a contingent, theoretical interest in the raisins or enjoyed indirect benefits from the regulatory program as a whole; and (3) whether the regulation effects a categorical taking is governed by the "nexus and rough proportionality" balancing test for land-use exactions under *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994). *Amicus* complements that analysis by illustrating how the panel decision will have wide-ranging negative practical effects on private property rights, by highlighting the ways in which the decision conflicts with established precedent and creates doctrinal confusion, and by explaining how it harms important interests that are well served by the longstanding categorical rule.

A. The Per Se Physical Takings Rule Is An Important Bulwark For Private Property Rights

The panel's basic doctrinal innovation—i.e., analyzing a physical taking of petitioners' raisins under a more fact-intensive regulatory standard than *Loretto*'s per se rule—undermines important interests of predictability and clarity reflected in this Court's development of categorical rules for particular classes of takings.

Regulatory takings have long been governed by the "essentially *ad hoc*, factual inquiry" set forth in *Penn Central Transportation Co.* v. *New York City*,

438 U.S. 104, 124 (1978); see also *E. Enters.* v. *Apfel*, 524 U.S. 498, 523 (1998) (plurality opinion). By design and practical effect, that approach requires courts to undertake "complex factual assessments of the purposes and economic effects of government actions," *Yee* v. *City of Escondido*, 503 U.S. 519, 523 (1992), and to grapple with that "well-known, if less than self-defining" question, *Palazzolo* v. *Rhode Island*, 533 U.S. 606, 617 (2001), of whether a particular regulation "goes too far," *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922). That approach stems from the pragmatic concern that subjecting "regulations prohibiting private uses [of property]" to a categorical takings rule "would transform government regulation into a luxury few governments could afford," given the "ubiquit[y]" of such regulations in the modern era. *Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302, 323-324 (2002). But the regulatory takings test has, in practice, become a famously "difficult problem"; "The attempt to determine when regulation goes so far that it becomes, literally or figuratively, a 'taking' has been called the 'lawyer's equivalent of the physicist's hunt for the quark.'" *Williamson Cnty. Reg'l Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U.S. 172, 199-200 & n.17 (1985) (quoting C. Haar, *Land-Use Planning* 766 (3d ed. 1976)).

This complex and fact-intensive approach for regulatory takings analysis imposes significant costs on property owners and litigants, and burdens the exercise of private property rights. "[A] party challenging governmental action as an unconstitutional taking bears a substantial burden,"

E. Enters., 524 U.S. at 523, in navigating the complex, ad hoc, regulatory-takings framework. In addition to requiring property owners to adduce proof on a wide range of issues (such as a regulation's "economic effect on the landowner," interference with "reasonable investment-backed expectations," and "the character of the government action," *Palazzolo*, 533 U.S. at 617), the regulatory takings doctrine necessarily deprives property owners of predictability and certainty. "Cases attempting to decide when a regulation becomes a taking are among the most litigated and perplexing in current law." *E. Enters.*, 524 U.S. at 541 (Kennedy, J., concurring in the judgment and dissenting in part); see also *Store Safe Redlands Assocs.* v. *United States*, 35 Fed. Cl. 726, 729 (1996) ("Since 1922, the Supreme Court has applied a test in regulatory taking cases that is seen by many as so fact specific that general predictability is made very difficult."). Governments, too, suffer costs and uncertainty from unpredictable legal rules. See *E. Enters.*, 524 U.S. at 542 (Kennedy, J.) ("boundar[ies] for application of the regulatory takings rule provid[e] some necessary predictability for governmental entities").

Similar concerns have been raised about the balancing test from *Nollan* and *Dolan*, which the Ninth Circuit extended to personal property. Although the "essential nexus" and "rough proportionality" standards have been viewed by some as "apply[ing] heightened scrutiny to challenged land use regulations," Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 Cal. L. Rev. 609, 622 (2004), by their terms they "are hardly beacons of

clarity," Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 Cardozo L. Rev. 93, 107 n.55, 191 (2002); see also Fenster, 92 Cal. L. Rev. at 629, 630 (*Nollan* and *Dolan* are "less clear than * * * rules defining per se regulatory takings as those that result in * * * permanent physical occupation," and "neither metric is exceptionally clear"). *Nollan* and *Dolan* require courts to grapple with a range of fact-intensive issues, including the "causal relationship between the harm of the proposed new use for the property, the regulation upon which the government relies in requiring the challenged concessions, the cost of the concessions, and the likelihood that the concessions would mitigate the harms." Fenster, 92 Cal. L. Rev. at 629-630; see also Pet. App. 26a-28a (analyzing purpose and performance of raisin marketing order for means-ends analysis).

In part for these reasons, ad hoc regulatory takings doctrines have engendered sharp criticism. See, *e.g.*, Bruce A. Ackerman, *Private Property and the Constitution* 8 (1977) (describing regulatory takings doctrine as "a chaos of confused argument"); Richard A. Epstein, *The Seven Deadly Sins of Takings Law: The Dissents in* Lucas v. South Carolina Coastal Council, 26 Loy. L.A. L. Rev. 955, 966 (1993) (takings test is "so amorphous as to defy description"); J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 Ecology L.Q. 89, 102 (1995) (an "unworkable muddle" that "has generated a plethora of inconsistent and open-ended formulations that have failed to make sense"); John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. Cal. L. Rev. 1003, 1006-1007 (2003) ("[a] jurisprudential mess"); Carol M.

Rose, Mahon *Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. Cal. L. Rev. 561, 562 (1984) ("[C]ommentators propose test after test to define 'takings,' while courts continue to reach ad hoc determinations rather than principled resolutions."); Joseph L. Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 37 (1964) ("a welter of confusing and apparently incompatible results"); Stephen Durden, *Unprincipled Principles: The Takings Clause Exemplar*, 3 Ala. C.R. & C.L. L. Rev. 25, 27-28 (2013) (describing doctrine as "famously incoherent and a mess, a muddle (or muddled), confused, incomprehensible, standardless, and unprincipled" (internal quotation marks omitted); collecting authorities).

In contrast to this fact-intensive, ad hoc approach, this Court has carved out several bright-line, categorical rules in areas where clarity is particularly important and "in-depth factual inquiry" unnecessary. *Nixon* v. *United States*, 978 F.2d 1269, 1284 (D.C. Cir. 1992). Most obviously, "[w]hen the government physically takes possession of an interest in property for some public purpose," the existence of a taking is typically self-evident and the government is categorically required to pay just compensation. *Tahoe-Sierra*, 535 U.S. at 322 (citing *United States* v. *Pewee Coal Co.*, 341 U.S. 114, 115 (1951)). And this Court has enforced the categorical rules that a taking occurs whenever there is a permanent physical occupation, *Loretto*, 458 U.S. at 426, or a deprivation of all economically beneficial use of private property, *Lucas* v. *S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

Commentators have lauded these per se rules for providing predictability and certainty for property

owners—"a ray of light in the otherwise shadowy area of 'takings' law." Steven N. Berger, *Access for CATV Meets the Takings Clause: The Per Se Takings Rule of* Loretto *v.* Teleprompter Manhattan CATV Corp., 25 Ariz. L. Rev. 689, 703 (1983). Among its other virtues, under *Loretto*'s per se rule, "it is easy to tell when the rule has been violated—a boundary is traversed." Poirer, 24 Cardozo L. Rev. at 108. As a result, property owners face a less onerous burden in defending and litigating their rights, and governments gain predictability and certainty in the conduct of public affairs, and are subject to the full financial deterrent of the just-compensation guarantee. See *Loretto*, 458 U.S. at 437 ("[W]hether a permanent physical occupation has occurred presents relatively few problems of proof.").

The clarity of these categorical rules also promotes important interests related to private property rights—interests sharply undermined by the Ninth Circuit's diluted approach in this case. A per se rule allows property owners to make investments based on concrete expectations about the risk of government interference. See Patrick Wiseman, *When the End Justifies the Means: Understanding Takings Jurisprudence in a Legal System with Integrity*, 63 St. John's L. Rev. 433, 457-458 (1988) ("Insofar as property is conceptually a set of expectations, any rule which tends to settle expectations is, in that respect at least, a good rule."); Carol M. Rose, *Crystals and Mud in Property Law*, 40 Stan. L. Rev. 577, 577 (1988) ("hard-edged rules like these * * * are what property is all about"). Put differently, "[t]akings law should be predictable * * * so that private individuals confidently can commit resources

to capital projects." Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 Colum. L. Rev. 1697, 1700 (1988). Conversely, "ad hoc balancing is impossible to reconcile with a belief in the importance of preserving 'investment-backed expectation[s].'" *Ibid.*

Doctrinal clarity does much to preserve and protect property owners' investment-backed expectations. See Rose-Ackerman, 88 Colum. L. Rev. at 1711. By creating certainty that a physical invasion of property will result in just compensation, the per se rule establishes appropriate ex ante incentives for property owners, who will be secure in the knowledge that *any* physical invasion or occupation of property by the government is a compensable taking, whatever its scope or extent. See *Loretto*, 458 U.S. at 438 n.16 ("[W]hether the installation is a taking does not depend on whether the volume of space it occupies is bigger than a breadbox."). And "property owners and investors who believe that a rule-bound regulatory regime better protects their expectations than does an ad hoc balancing test in theory will commit more resources to capital projects, therefore enabling the highest and best use of property." Fenster, 92 Cal. L. Rev. at 620.

Under *Loretto*'s bright-line rule, a property owner can make decisions relevant to investments—*e.g.*, about acquiring property in the first instance, improving or developing existing holdings, or valuing property for future sale—based on a secure understanding that any physical occupation of property must be compensated. "By offering clear declarations of the extent of property owners' constitutional rights and limiting the discretion of

judges and administrative decision makers, clear rules ensure fair and value-neutral coherence, regularity, and predictability across disparate, individual cases." Fenster, 92 Cal. L. Rev. at 619. Moreover, doctrinal uncertainty under the ad hoc regulatory takings framework not only makes investors uncertain "whether or not damages will be paid," but also, if damages are not paid, means that "investors will be left bearing the costs of an uninsurable risk." Rose-Ackerman, 88 Colum. L. Rev. at 1700. From the perspective of optimizing the allocation of valuable resources, "[t]o the extent that investors are risk averse, the very incoherence of the doctrine produces inefficient choices." *Ibid.*

The per se rule also creates salutary incentives for the government, discouraging gamesmanship or efforts to reframe traditional "takings" to exploit doctrinal loopholes or ambiguities. Under a per se rule, the government's rationale for appropriating private property does not matter; so long as there is physical appropriation, a compensable taking has occurred. See *Tahoe-Sierra*, 535 U.S. at 323 ("we do not ask whether a physical appropriation advances a substantial government interest" under the "clear rule" governing "categorical taking[s]"). Under the panel's interpretation, by contrast, the government can physically appropriate personal property without any categorical obligation to compensate the owner, so long as the regulation satisfies the "nexus and rough proportionality" principles of *Nollan* and *Dolan*. Pet. App. 23a.

Uncertainty about how the fact-intensive and ad hoc legal standard will be applied to any given set of facts also reduces the anticipated cost of a taking for

the government, essentially discounting the rate of compensation by the possibility that the factfinder will conclude no compensation is owed. That uncertainty not only affects the government's choices, but also changes how property owners interact with the government. "By providing a doctrinal shield against the intrusive overregulation of local governments, formal takings rules smooth the 'frictions' caused by the struggles over regulatory indeterminacy and uncertainty, stabilizing and protecting property rights within the present distribution of property ownership and entitlements." Fenster, 92 Cal. L. Rev. at 620.

In short, the Ninth Circuit's decision undermines important interests critical to the protection of private property rights by replacing the safety of a categorical rule with the fact-intensive ad hoc balancing test of *Nollan* and *Dolan*.

B. The Panel's Doctrinal Error Affects Private Property Rights In A Broad Range of Contexts

The panel decision's practical consequences sweep far beyond the Depression-era agricultural regulations at issue in this case to affect property owners in many other areas. Federal and state case reporters are replete with examples of government attempts to appropriate or occupy personal property, highlighting the important and continuing role of a per se rule in protecting property rights. These cases vividly illustrate how the Ninth Circuit's approach, if applied to a range of other facts, would create incentives for strategic behavior, inviting governments to restructure regulations that effect de

facto physical appropriation of personal property in a manner that avoids paying just compensation. These cases also undercut any suggestion that the practical need for a categorical, per se rule for personal property is any less acute than in the context of real property.

One colorful example arose in *City of Oakland* v. *Oakland Raiders*, 646 P.2d 835 (Cal. 1982). In 1980, the Oakland Raiders franchise of the National Football League announced its intention to move to Los Angeles. In response, the City of Oakland initiated an eminent domain proceeding to prevent the move by "acquir[ing] by eminent domain the property rights associated with [the Raiders'] ownership of a professional football team as a franchise member of the National Football League."[2] *Id.* at 837. The California Supreme Court held that the Raiders' property interests were condemnable under California law, bringing into sharp focus the importance of constitutional takings protection.

The California Supreme Court approached the case apparently without ever questioning that assuming possession and ownership of the team

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[2] For a more detailed history, see Leon F. Mead II, *Raiders: $72 Million, City of Oakland: 0...Was That the Final Gun – A Story of Intrigue, Suspense and Questionable Reasoning*, 9 Loy. L.A. Ent. L. Rev. 401 (1989). Oakland is not the only city tempted by this tactic. Maryland authorized the City of Baltimore to use eminent domain to prevent the NFL's Colts franchise from moving to Indianapolis. See Charles Gray, *Keeping the Home Team at Home*, 74 Cal. L. Rev. 1329, 1330-1331 & n.14 (1986).

would constitute a taking.[3] But under the Ninth Circuit's formulation, it is far from clear whether that assumption would hold true, given that the various property rights that make up a football franchise (*e.g.*, trademarks, player contracts) were personal, not real, property. Moreover, in the wake of the panel's ruling here, it is not hard to imagine how Oakland could have altered its strategy to fit the panel's loophole. For instance, the City might have demanded a fractional interest in the team in the event its owners chose to relocate, perhaps in service of a stated goal of regulating the "market" for professional football services. Or the City might have made the team less valuable by taking title to a certain fraction of the tickets offered, again in the guise of market regulation. Under the panel's approach, a court might conclude that such a regulation was a mere "use" restriction that satisfied the "nexus and rough proportionality" test of *Nollan* and *Dolan*, so long as the Raiders were theoretically entitled to any residual value after the City disposed of the tickets.

In *Milwaukee & Suburban Transport Corp.* v. *Milwaukee County*, 263 N.W.2d 503 (Wis. 1978),

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[3] In the cited decision, the California high court held that whether taking the team was a "public use" was a jury question; the Raiders ultimately prevailed on public use, antitrust, and Commerce Clause grounds, effectively rejecting the City's attempt to condemn the franchise. See Mead, *supra* note 2, at 406-407. But there is little reason to believe those alternate protections will be present in a typical case. Cf. *Am. Needle, Inc.* v. *Nat'l Football League*, 130 S. Ct. 2201, 2216 (2010) (noting "special characteristics" of National Football League relevant to antitrust analysis).

Milwaukee County condemned the assets of a private bus system and began operating the system under public ownership. See *id.* at 508 ("There was no interruption of service. The same buses were driven on the same routes by the same employees."). Again, it is far from clear that *Milwaukee*'s view of the transaction as a paradigmatic taking, in which the County expressly appropriated the bus system, would survive the panel's holding that *Loretto* applies only to real property. In any event, the County might have restructured its takeover to fall under the panel's balancing-test framework, potentially exempting itself from any obligation to pay compensation. For example, rather than "taking" the entire bus system, the County could have required the private owners to accept a certain number of riders who present bus fares sold by the County—in the vernacular of the raisin marketing order, setting aside for public use a "reserve" portion of all bus seats, which the County could dispose of as it sees fit, perhaps with the possibility of a contingent future benefit to the bus company. The Ninth Circuit's decision here suggests even those egregious actions would not be subject to a per se physical takings test.

Of course, appropriation of personal property can also occur when a government initially seizes property for a purpose other than eminent domain. In *Lee* v. *City of Chicago*, police impounded an innocent bystander's private vehicle for investigation because it had been struck by a stray bullet. 330 F.3d 456 (7th Cir. 2003). After the investigation, the owner discovered that the City had painted large red inventory numbers on three sides of the vehicle. *Id.* at 459. Although the case was not litigated on

takings grounds, Judge Wood concluded that the plaintiff had "suffered [a] * * * taking: governmental authorities physically took some of his personal property for a public purpose and kept it for a period of time." *Id.* at 474 (Wood, J., concurring). Notably, she cited *Loretto* in concluding that "[a]ny physical occupation is enough [for a taking], even where the owner retains at least some use." *Id.* at 475. But under the Ninth Circuit's analysis, *Loretto* would not apply, because a car is personal, not real, property, and because any takings claim would be relegated to the "nexus and rough proportionality" standard from *Nollan* and *Dolan*, or the ad hoc balancing test for regulatory takings.

To similar effect, the plaintiff in *Innovair Aviation, Ltd.* v. *United States*, 72 Fed. Cl. 415 (2006), *rev'd on other grounds*, 632 F.3d 1336 (Fed. Cir. 2011), was completing the turboprop conversion of certain airplanes that were under contract to Air Colombia when the U.S. government seized the planes, claiming that Air Colombia was a front for drug cartels that allegedly purchased the airplanes with drug proceeds. 72 Fed. Cl. at 416-418. The plaintiff sought compensation for the taking of the planes. *Id.* at 419. The court held that the seizure was a per se taking of the plaintiff's private property, analogizing to *Loretto* instead of *Penn Central* because "[h]ere we have the total destruction of the Plaintiff's property." *Id.* at 423. Citing *Nixon*, 978 F.2d 1269 (discussed below and at Pet. 18-19), the court rejected the government's contention that the per se takings analysis only applies to real property, noting that there, as in *Nixon*, "the Plaintiff's personal property was permanently and completely

appropriated by the Government." 72 Fed. Cl. at 423. *Innovair* ultimately found that the plaintiff had suffered a compensable taking when the government physically occupied its personal property. Under the panel's analysis, that clear-cut approach would be replaced with a far more uncertain, ad hoc inquiry.

These cases provide just a few examples of how the panel's holding encourages gamesmanship and strategic behavior, as governments will rationally seek to avoid paying compensation. As *City of Oakland* and *Milwaukee* illustrate, governments often have strong financial, practical, or other incentives to appropriate personal property, and to disguise the true costs of those choices—in a wide range of substantive areas. One recent Washington, D.C. law prohibited patented drugs from being sold in the District for an "excessive" price, requiring drug manufacturers to rebut a presumption of excessiveness if the price of a drug is more than 30% higher than in the United Kingdom, Germany, Canada, or Australia. See Prescription Drug Excessive Pricing Act of 2005, codified at D.C. Code §§ 28-4551-28-4555. That statute represented a clear attempt to disguise the true fiscal cost of providing a public benefit—shifting the cost of subsidized drugs from taxpayers (who otherwise would have to use public funds) to a drug's inventors and manufacturers. See *Biotechnology Indus. Org.* v. *District of Columbia*, 496 F.3d 1362, 1374 (Fed. Cir. 2007) ("The Act is a clear attempt to * * * diminis[h] the reward to patentees in order to provide greater benefit to District drug consumers."). Under the Ninth Circuit's reasoning, the District could have achieved the same goal by requiring pharmaceutical

companies physically to provide low-income residents with patented drugs free of charge.

If *Loretto*'s per se rule is wholly inapplicable to personal property, public officials will shift their strategy away from forthright use of eminent domain and toward regulatory regimes that achieve a similar practical outcome on the cheap. The Ninth Circuit's decision opens a back door to abusive government actions, despite this Court's efforts to bar those approaches though per se rules about physical occupation.

C. The Decision Creates Sharp Conflicts Of Authority By Analyzing A Physical Taking Of Personal Property Under A Fact-Intensive Balancing Test

As petitioners explain, the panel erred and departed from the approach of numerous other courts, by holding that *Loretto*'s categorical rule for permanent physical occupations of property does not apply to "controversies involving personal property" or where property owners retain some contingent benefit from government expropriation, and by re-characterizing a physical appropriation as a "use" restriction subject to the balancing test from *Nollan* and *Dolan*. Pet. App. 20a; Pet. 15-20. *Amicus* supplements those arguments and identifies other authorities with which the panel decision conflicts.

As the petition notes, Pet. 18, a leading case is *Nixon* v. *United States*, 978 F.2d 1269 (D.C. Cir. 1992), in which the former President challenged regulations promulgated under the Presidential Records and Materials Preservation Act of 1974 effectively "authoriz[ing] the Administrator of

General Services to retain complete possession and control of all papers, documents, memorandums, transcripts, and other objects and materials that constitute the presidential historical records of Richard M. Nixon." *Id.* at 1271 (internal quotation marks omitted). The government advanced precisely the same theory adopted by the panel here—only to have the D.C. Circuit squarely reject that approach. Pet. 18-19. The *Nixon* court's reasoning merits close attention, as it continues to be relevant today. Among other things, the court explained that "[t]he rationale for the per se rule is that actual occupation of property obviates an in-depth factual inquiry to determine whether one's economic interests have been sufficiently damaged as to warrant compensation." *Nixon*, 978 F.2d at 1284. And the D.C. Circuit emphasized that this Court's "actual holding [in] *Loretto* makes no mention of a distinction between real and personal property, nor was any rationale given in the opinion that may justify such a distinction." *Id.*

Underscoring the systematic incentives governments have to push the limits of takings law, the court in *Rose Acre Farms, Inc.* v. *United States*, 373 F.3d 1177, 1196 (Fed. Cir. 2004), felt compelled to emphasize that "[t]he trial court correctly rejected the government's contention that a 'per se' takings analysis is never applicable when personal property is at issue." That case involved a complex set of health and food-safety testing requirements for poultry farmers, which included the seizure and destruction of certain chickens by government agents. The Federal Circuit noted that when this Court had been "presented, recently, with the opportunity" to

hold that "categorical takings are limited to the taking of real property," it specifically declined to do so in a case involving other personal property (i.e., interest on lawyers trust accounts). *Id.* at 1196 n.17 (citing *Brown* v. *Legal Found. of Wash.*, 538 U.S. 216 (2003)). The Federal Circuit drew particular significance from this Court's "agree[ment]," in *Brown*, "that a per se approach is more consistent" with prior precedent than an ad hoc standard, and that "the transfer of the interest [on the trust accounts] seems more akin to the occupation of a small amount of rooftop space in *Loretto*." *Brown*, 539 U.S. at 235; see generally *Rose Acre Farms*, 373 F.3d at 1196 n.17.[4]

Other courts and judges have reached the same conclusion. In a case involving a takings challenge to a law requiring tobacco companies to disclose trade secrets, Judge Selya explained that "[l]imiting per se takings analysis to cases involving real property is a crude boundary with no compelling basis in the law." *Philip Morris, Inc.* v. *Reilly*, 312 F.3d 24, 51 (1st Cir. 2002) (Selya, J., concurring in the judgment). And, as noted, Judge Wood looked to *Loretto* in analyzing the government's "physical occupation" of a portion of a private automobile. *Lee*, 330 F.3d at 474-475.

R.J. Widen Co. v. *United States*, 357 F.2d 988 (Ct. Cl. 1966) (per curiam), is to similar effect. There, a

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[4] *Rose Acre Farms* ultimately held that the laws at issue did not involve a per se taking. 373 F.3d at 1197. But the Federal Circuit's extensive discussion of *Brown* makes clear that the case should not be read to support the panel's sweeping approach here. The possibility that *Rose Acre Farms* might be read in that manner, cf. *id.* at 1198, only underscores the need for this Court's intervention.

property owner contended that the United States had taken its personal property by constructing a dam and depriving the property owner of a water supply necessary to operate its leather-tanning business—including not only occupation of real property, but also damage to personal property such as tanning supplies and hides damaged as a result of lack of access to water. *Id.* at 991. Although the court found that the specific damage to personal property there represented consequential damages outside the Fifth Amendment's protection, it emphasized that "[u]ndoubtedly, the United States could here have 'taken' plaintiff's personal property and business, in which case just compensation would be due." *Id.* at 993.

In *Seery* v. *United States*, 161 F. Supp. 395, 399 (Ct. Cl. 1958), an opera star sued the United States "for just compensation for the taking by the Army of her real and personal property." The plaintiff alleged damage to her residence, home furnishings, and other personal property when the U.S. Army commandeered her Austrian "castle-like villa" as an officers' rest home during and after World War II. *Id.* at 396. Without any suggestion of applying a complex regulatory takings analysis, the court undertook a straightforward assessment of what personal property the Army had stolen or destroyed, concluded that "a considerable amount of the plaintiff's personal property was lost or destroyed while in the Army's possession," and awarded damages accordingly. *Id.* at 399.

By concluding that *Loretto*'s per se physical takings rule does not apply to government appropriation of personal property, and by instead

treating a physical taking as a mere "use restriction," the panel drew all of these cases into question, and departed from the great weight of precedent, which recognizes (or applies) a categorical standard to claims that the government has physically taken personal property. This Court's intervention is necessary to resolve this conflict of authority.

II. The Panel's "Use Restriction" Theory Guts Protections For Personal Property

As petitioners explain, the panel departed from long-established precedent when it sought to immunize the government's seizure of title to a portion of petitioners' raisin crop as a mere "use restriction" (Pet. App. 23a) on personal property. The panel reasoned that the marketing order applies only "insofar as [petitioners] voluntarily choose to send their raisins into the stream of interstate commerce," and suggested petitioners could "avoid" the regulations "by planting different crops, including other types of raisins, not subject to this Marketing Order or selling their grapes without drying them into raisins." *Id.* at 25a-26a.

The notion that the government may condition a business owner's participation in the free market on transferring legal title to a fraction of its goods is of the gravest concern to the Chamber and its members, and casts a cloud over business owners nationwide. That theory admits to no principled limitation, and could justify a range of confiscatory actions, from a requirement that farmers give up 50% of their acreage or other property rights as a condition of selling their crops, to a law that takes physical possession of half the cars from an automaker's

assembly line as a "use restriction" on selling them in commerce.[5] Even beyond the creation of sharp conflicts of authority, Pet. 27-33, the dire practical effects for property owners nationwide of the panel's "use restriction" theory independently demonstrate the urgent need for this Court's review. See *Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302, 320 (2002) (cert. granted on takings issue "[b]ecause of the importance of the case").

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[5] Nor could petitioners avoid the marketing order by disposing of their raisins in the intrastate market. See, *e.g.*, *Gonzales* v. *Raich*, 545 U.S. 1, 17 (2005) ("Our case law firmly establishes Congress's power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2014

Supreme Court, U.S.
FILED
OCT - 8 2014
OFFICE OF THE CLERK

No. 14-275

In the Supreme Court of the United States

MARVIN D. HORNE, ET AL., PETITIONERS,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
RESPONDENT.

On Petition for a Writ Of Certiorari To The United States Courts Of Appeals For the Ninth Circuit

BRIEF OF CONSTITUTIONAL AND PROPERTY LAW SCHOLARS AS AMICI CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

The Takings Clause of the Fifth Amendment imposes a "categorical duty" on the federal government to pay just compensation when it "physically takes possession of an interest in property." *Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012) (internal quotations omitted).

Did the United States Court of Appeals for the Ninth Circuit err when it held that this duty applies only to takings of real property, and not personal property?

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INTEREST OF AMICI CURIAE[1]

Amici curiae are scholars who teach, research, and write about constitutional and property law. They share the view that the Takings Clause of the Fifth Amendment to the U.S. Constitution has always been understood to apply equally to both real and personal property. Accordingly, amici believe that this Court should grant the petition, reverse the Ninth Circuit, and make clear that the Takings Clause applies equally to all private property.

Amici include James W. Ely Jr., the Milton R. Underwood Professor of Law Emeritus and Professor of History Emeritus at Vanderbilt University; Donald Kochan, the Associate Dean for Research & Faculty Development and Professor of Law at the Chapman University Dale E. Fowler School of Law; Adam Mossoff, Professor of Law at the George Mason University School of Law; and Ilya Somin, Professor of Law at the George Mason University School of Law.

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[1] Pursuant to Supreme Court Rule 37.6, amici curiae states that no counsel for any party authored this brief in whole or in part, and that no person or entity other than amici curiae or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for respondent and petitioner in this case has filed a letter pursuant to Supreme Court Rule 37.2(a) reflecting consent to the filing of amicus curiae briefs in support of either party. Pursuant to Supreme Court Rule 37.2, both parties received notice of amici's intent to file this brief. Amici mistakenly notified Respondent of their intention to file this brief eight days before the due date, rather than ten days before. However, Respondent acknowledged receipt of the notice, had at least ten days' notice of the filing of the other amicus briefs in this case, and has consented to the filing of this amicus brief.

SUMMARY OF THE ARGUMENT

"Property must be secured or liberty cannot exist." John Adams, *Discourses on Davila* 92 (Russell & Cutler 1805).

Protecting private property was of paramount importance to our Founders. As Alexander Hamilton explained at the Constitutional Convention of 1787, "one great obj[ect] of Gov[ernment] is [the] personal protection and security of property." 1 *Records of the Federal Convention of 1787*, at 302 (Max Ferrand ed., 1911).

The Constitution itself reflects the Founding generation's emphasis on the importance of protecting private property, containing among its enumerated rights several provisions recognizing the rights of citizens in their belongings.

Notable among those is the Takings Clause of the Fifth Amendment, which provides for just compensation in the extraordinary circumstance where the state uses its powers to confiscate a citizen's belongings, ostensibly for public use.

Yet, in this case, the Ninth Circuit jettisoned this fundamental protection, holding that the Takings Clause applies fully only when the government has confiscated *real* property, not *personal* property.

But this holding comports with neither the original understanding of the Taking Clause's scope, nor the manner in which it has been applied in the intervening centuries. Since the Founding, it has been understood that the Takings Clause protects all of a citizen's private property—both real and personal.

This Court should grant the writ of certiorari and reverse the Ninth Circuit.

ARGUMENT

The Takings Clause of the Fifth Amendment provides that "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

The Ninth Circuit took this simple statement and somehow concluded that the "Clause affords more protection to real than to personal property." Pet. App. 18a. Accordingly, it held that the categorical requirement that just compensation be provided for property expropriated by the government does not apply when the property in question is personal property.

This holding could not be further unmoored from history. As James Madison, the driving force behind the federal Takings Clause, wrote in his famous 1792 essay *Property*, "Government is instituted to protect *property of every sort*." James Madison, *Property*, *reprinted in* 14 *The Papers of James Madison* 266-68 (William T. Hutchison et al. eds., 1977).

Thus, the Takings Clause has always been understood—by the Founders and subsequent generations—to apply equally to real and personal property.

I. The Text of the Takings Clause Draws No Distinction Between Types of Property.

The Takings Clause states plainly that that "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. If the Framers wished to limit its reach to real property, they could have said just that. But they did not. There is simply nothing in the text of the Clause to support the Ninth Circuit's judicially invented limitation of the Clause to only real property.

II. The Clause Was Understood at the Founding to Apply to Personal Property.

1. The Takings Clause's historical roots stem from the laws of England. Englishmen established the basic liberties of English citizens in a series of documents ranging from the Magna Carta to the English Bill of Rights—and as English subjects, the colonists considered themselves to be vested with those same rights. *See McDonald v. City of Chi., Ill.*, 130 S. Ct. 3020, 3064 (2010) (Thomas, J. concurring).

The first of these foundational documents, the Magna Carta, contained a progenitor of the Takings Clause that required compensation for the taking of property, with no limitation to only real property.

Indeed, the Magna Carta explicitly encompassed chattel in the category of items which may not be confiscated without compensation, stating that "[n]o constable or other bailiff shall take *corn or other provisions* from any one without immediately tendering money therefor." Magna Carta § 28 (emphasis added), *reprinted in* William Sharp McKechnie, *Magna Carta* 329 (2d ed. 1914).

2. This legal protection of an individual's personal property was also manifested in our nation's early history, as evidenced by early colonial documents.

For example, the Massachusetts Body of Liberties of 1641—the colony's first proto-constitution—contained a takings clause providing that "No mans *Cattel or goods of what kidne soever* shall be pressed or taken for any publique use or service, unlesse it be by warrant grounded upon some act of the generall Court, nor without such reasonable prices and hrie as the ordinarie rates of the Countrie do afford. And if his *Cattle or goods* shall perish or suffer damage in

such service, the owner shall be suffitiently recompenced." Massachusetts Body of Liberties § 8 (1641), *reprinted in* 13 *American Historical Documents 1000-1904*, at 70, 71-72 (2009 ed.).

Similarly, during the Yamasee War—an early eighteenth-century conflict between colonial South Carolinians and certain Native American tribes—the colony of South Carolina passed legislation authorizing the confiscation of various forms of property including horses, boats, and "any quantity of goods and other necessaries for the service of the war." An Act to Appoint A Press Master (1716), *reprinted in* 2 Thomas Cooper, *Statutes at Large of South Carolina* 680, 681 (1837 ed.). The owners of confiscated personal property were entitled to "just satisfaction for all damage which may accrue to them while made use of by the publick." An Act for Raising Forces to Prosecute the War Against Our Indian Enemies (1715), *reprinted in* 2 Thomas Cooper *Statutes at Large of South Carolina* 634, 637 (1837 ed.). *See also* James W. Ely, Jr., *"That Due Satisfaction May Be Made" The Fifth Amendment and the Origins of the Compensation Principle*, 36 Am J. Legal Hist. 1, 12, 13-15 (1992).

3. Our nation's Founders took these principles to heart. Rather than limiting the Clause as applying only to "lands" or "real property," the Founders sought to protect "private property" in the Fifth Amendment. To be sure, the use of the term "private property" leads to the question whether the Founders considered "private property" to include only real property—as the Ninth Circuit would have us believe—or whether it includes both real and personal property. But a review of historical sources confirms that the answer is unequivocally the latter. At the

time of the Framing, "private property" included both personal and real property.

William Blackstone—whose works this Court has said, "constituted the preeminent authority on English law for the founding generation," *Alden v. Maine*, 527 U.S. 706, 715 (1999)—defined an individual's absolute rights in property as consisting "in the free use, enjoyment, and disposal of *all his acquisitions*, without any control of diminution, save only by the laws of the land." 1 William Blackstone, *Commentaries* 134 (emphasis added).

As Blackstone explained, ownership of "property" means claim and exercise "over the external things of the world, in total exclusion of the right of any other individual in the universe"—a definition which plainly encompassed personal property as well as real property. 2 William Blackstone, *Commentaries* 2.

A review of contemporary dictionaries is also instructive. Samuel Johnson, for example, defined property broadly as "Right of possession," "Possession held in one's own right," and "The thing possessed." 2 Samuel Johnson, *Dictionary of the English Language* (1755 ed.). And Noah Webster defined property as "An estate, whether in lands, *goods or money*," and included by way of example "the productions of [one's] farm or ... shop." Noah Webster, *American Dictionary of the English Language* (1828) (emphasis added).

4. Madison's view of the Takings Clause's scope is particularly crucial in illuminating the Clause's original meaning. He was, after all, its primary drafter. *See* Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 77-78 (1998).

Significantly, Madison incorporated Blackstone's broad conception of property in his writings on the

subject. In his essay *Property*, published just after the ratification of the Bill of Rights, Madison implicitly incorporated Blackstone's definition of property as "that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual." James Madison, *Property*, *reprinted in* 14 *The Papers of James Madison* 266-68 (William T. Hutchison et al. eds., University Press of Virginia 1977). Even in what Madison considered the more narrow sense of the word, he defined property as "a man's land, or merchandize, or money." *Id.*

Indeed, in Madison's view, it was the purpose of the government to "protect *property of every sort*, as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a just government, which impartially *secures to every man, whatever is his own*." *Id.* (emphases added).

Madison's broad understanding of the Takings Clause's meaning is evident in the language he employed in drafting it. At the Founding, the phrase "private property" was widely understood to encompass both personal and real property.

Moreover, Madison's contemporaries shared his view that the Takings Clause protected property of all types. John Jay, for example, publicly denounced the "[p]ractice of impressing Horses, Teems, and Carriages by the military, without the Intervention of a civil Magistrate, and without any Authority from the Law of the Land." John Jay, A Hint to the Legislature of the State of New York (1778), *reprinted in* 1 *John Jay: Unpublished Papers* (Richard B. Morris et al. eds., 1975). It was with this intent that the Takings Clause was written—and that was also how it

was understood at the time. In the very first legal treatise written on the Constitution, St. George Tucker explained that the Takings Clause was enacted "to restrain the arbitrary and oppressive mode of obtaining *supplies* for the army, and other public uses." 1 St. George Tucker, *Blackstone's Commentaries* app. at 305-06 (1803) (emphasis added).

III. Since the Founding, the Takings Clause Has Been Consistently Applied Equally to Personal Property and Real Property.

The history of the Takings Clause after the Founding generation—and that of its state counterparts—further confirms that the Clause has *always* applied equally to personal property.

1. In 1871, this very Court affirmed this understanding of the Takings Clause. In *United States v. Russell*, 80 U.S. 623 (1871), one of the first cases to interpret the Clause directly,[2] this Court held that it required the federal government to provide compensation for steamships confiscated as part of the Civil War effort. *Id.* at 627, 630 ("Beyond doubt such an obligation raises an implied promise on the part of the United States to reimburse the owner for the use of the steamboats "). A steamboat, of course, is not real property. And since that decision, courts have consistently held the confiscation by the government of personal property, not just real property, constitutes a *per se* taking. *See, e.g.*, Pet. 16-20.

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[2] Supreme Court interpretation of the Takings Clause prior to Reconstruction is sparse, in part because Congress did not authorize the federal government to exercise the power of eminent domain until the 1860s. *See Kohl v. United States*, 91 U.S. 367, 373 (1875).

2. The federal government is not alone in protecting the right to personal as well as real property. From the Nineteenth Century on, courts have consistently held that the state analogues to the Takings Clause applied equally to all sorts of property, not just real property.

For example, the Massachusetts Constitution of 1780 provided that "whenever the public exigencies require, that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor." Mass. Const. of 1780, part I, art. X, *reprinted in Popular Sources of Political Authority: Documents on the Massachusetts Constitution of 1780* (Handlin & Handlin eds., 1966).

And in one of the earliest cases to interpret that language, the Massachusetts Supreme Court determined that it applied to chattel, as well as real property. *Perry v. Wilson*, 7 Mass. 393 (1811). Specifically, the Court held that the state constitution required compensation for logs taken for canal construction. *Id.* at 394-95. Four decades later, Chief Justice Lemuel Shaw confirmed this broad understanding of the Commonwealth's takings provision, stating that it applied broadly to "every valuable interest which can be enjoyed as property and recognized as such." *Old Colony & Fall River R.R. v. Cnty. of Plymouth*, 80 Mass.155, 161 (1859).

Similarly, personal property has long received the same constitutional protection as real property. The case law demonstrates that many forms of property besides real property have been considered constitutional private property under various takings clauses, from patents to franchises.

Regarding patents, "the nineteenth-century jurisprudence was quite clear: patents were private prop-

erty rights secured under the Constitution." Adam Mossoff, *Patents as Constitutional Private Property: The Historical Protection of Patents Under the Takings Clause*, 87 B.U. L. Rev. 689, 700-11, 711 (2007); *see also McKeever v. United States*, 14 Ct. Cl. 396 (1878) (patents secured under Takings Clause).

And as to franchises, this Court held in *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893), that the owner of a lock and dam, who also owned a "vested franchise to receive tolls for its use," was entitled to just compensation for the taking of both the real property and the franchise. *Id.* at 344. In reversing the trial court, which had granted compensation for only the lock and dam itself, this Court stated "[s]uch a franchise was as much a vested right property as the ownership of the tangible property," and that "just compensation requires payment for the franchise to take the tolls, as well as for the value of the tangible property." *Id.* at 344-45.[3]

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[3] *See also, e.g., Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 571 (1837) (McLean, J, concurring in result) (noting in a Contracts Clause case, which he believed should have been dismissed for want of jurisdiction, that in granting a charter for the Warren Bridge, the Massachusetts legislature provided compensation to the franchise holders of the Charles River Bridge company); *Enfield Toll Bridge Co. v. Hartford & New Haven R.R.*, 17 Conn. 40, 59-61 (1845) ("The right rests upon the principle, that individual interests must be subservient to that of the public, and that they must yield, when public necessities require. This, however, in constitutional governments, is not to be done, but upon compensation. The principle, then, is broad enough to include all kinds of property."); *Piscataqua Bridge v. N.H. Bridge*, 7 N.H. 35, 66 (1834) ("That franchise, as we have said, is property.").

As the late-nineteenth century law professor and Michigan Supreme Court Justice Thomas Cooley noted, "[e]very species which the public needs may require is subject to be seized and appropriated under the right of eminent domain," including: "timber, stone, and gravel." Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 646 (6th ed. 1890). And as Cooley wrote in his influential treatise *General Principles of Constitutional Law in the United States*, "[t]he property which the Constitution protects is anything of value which the law recognizes as such." Thomas M. Cooley, *General Principles of Constitutional Law in the United States of America* 336 (1880 ed.). Personal property is just that.

This understanding is reflected in more recent case law as well, making the Ninth Circuit's conclusion even less tenable. In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), this Court held unanimously that interest earned on interpleader funds deposited in the registry of a county court in Florida constituted protectable property and that its taking without compensation by the county constituted a violation of the Fifth and Fourteenth Amendments. *Id.* at 164. *Cf. id.* at 161 ("[P]roperty interests are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source[.]") (internal quotations and citations omitted) (omission in original).

Indeed, in *Nixon v. United States*, 978 F.2d 1269 (D.C. Cir. 1992), a panel of the D.C. Circuit concluded that President Nixon's private presidential papers were "property" for the purposes of the Fifth

Amendment and that their confiscation pursuant to the Presidential Recordings and Materials Preservation Act was a *per se* taking entitling him to just compensation. *Id.* at 1287.

* * *

The historical record unambiguously demonstrates that the government's confiscation of personal property has been considered a compensable *per se* taking prior to, during, and since the Founding. The Ninth Circuit's rejection of this unbroken history on the basis of dicta and convoluted legal reasoning was not only wrong, it has led it to deviate from this Court's prior holdings and create a split among the Circuit Courts of Appeals.

This Court's intervention is needed to bring the law of the Ninth Circuit in line with this Court's precedents, as well as those of its sister circuits.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the judgment of the U.S. Court of Appeals for the Ninth Circuit.

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DATED: October 8, 2014

Supreme Court, U.S.
FILED
OCT 8 - 2014
OFFICE OF THE CLERK

No. 14-275

IN THE

Supreme Court of the United States

MARVIN D. HORNE, *ET AL.*,

Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE DKT LIBERTY PROJECT AND EIGHTEEN INDEPENDENT RAISIN GROWERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*

Thomas Jefferson warned that "[t]he natural progress of things is for liberty to yield, and government to gain ground." Letter from Thomas Jefferson to Edward Carrington (May 27, 1788). Mindful of this trend, The DKT Liberty Project was founded in 1997 to promote individual liberty against encroachment by all levels of government. This not-for-profit organization advocates vigilance over regulations of all kinds, particularly those that unduly interfere with the property rights of private individuals. The DKT Liberty Project has participated as *amicus* in this Court several times in the past, including in cases raising government takings issues, such as *Kelo v. City of New London*, 545 U.S. 469 (2005).

Joining The DKT Liberty Project as *amici* are eighteen independent California raisin growers[2] ("the Growers") whose crops are subject to the Raisin Marketing Order at issue in this case. The Growers produce raisins on small vineyards ranging from 18

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[1] Pursuant to Rule 37.2(a), *amici* confirm that all parties have consented to the filing of this brief. Petitioners' and Respondent's letters of consent to the filing of this brief have been filed with the Clerk's office. Pursuant to Rule 37.6, *amici* further affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to this brief's preparation or submission.

[2] The Growers are identified individually in Appendix A to this brief ("App. A").

to 240 acres, which they have tended for an average of nearly 40 years. Many of the Growers carry on a multi-generational tradition of raisin growing in their families; indeed, some are third- or fourth-generation growers, and others continue family businesses dating back nearly 100 years. *See generally* App. A.

The Growers expend considerable resources in cultivating and harvesting their raisin crops each year. Only after they have expended these resources and harvested their crops do the Growers receive notice of the "reserve tonnage" of raisins their handlers will be compelled to segregate and then turn over to the Raisin Administrative Committee ("RAC")—an arm of the United States Department of Agriculture—to comply with the requirements of the Raisin Marketing Order that are at issue in this case. This "reserve tonnage" requirement is established by the RAC on an annual basis and requires the Growers to essentially give away a part of their raisin crop to the federal government each year. The Growers often forego not only the profits they would otherwise earn from the sale of those "reserve tonnage" raisins, but also their costs of production. Consequently, many of the Growers have resorted to taking second jobs or even to selling off acreage as a means of financing continued raisin production on what remains of their vineyards. *See* App. A at 1a, 3a–4a. The Growers thus have significant personal and economic interests in the Court's resolution of this case.

SUMMARY OF ARGUMENT

The Raisin Marketing Order[3] effectuates a direct, physical taking of a percentage of the Growers' raisin crops every year. *See* 7 C.F.R. §§ 989.65–66. The Fifth Amendment requires that the Growers receive just compensation for this taking, and the Ninth Circuit panel erred in concluding otherwise. The panel did so based on a fundamental misunderstanding of Petitioners' and the Growers' enterprises and a corresponding mischaracterization of the challenged reserve requirement as a mere condition on one particular "use" of their raisin crops. The panel further relied on a distinction between real and personal property that lacks foundation in the relevant case law, and one that proves particularly illusory in this context.

Unsurprisingly, the panel's erroneous reasoning on both grounds conflicts with this Court's and other courts' precedents. This Court should grant the petition to resolve these conflicts and to clarify that personal property enjoys the same Fifth Amendment protections as real property and that the government cannot condition entry into the stream of commerce on giving up the right to just compensation. More importantly, however, the Court should grant the petition to remedy a longstanding constitutional violation that not only results in a significant

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[3] *Handling of Raisins Produced from Raisin Variety Grapes Grown in California*, 14 Fed. Reg. 5136 (Aug. 18, 1949) (codified, as amended, at 7 C.F.R. Part 989) ("Raisin Marketing Order" or "Order").

hardship to California raisin growers, but also threatens to infect the regulatory schemes governing many other industries as well.

ARGUMENT

I. The Growers Cultivate A Specialized, Resource-Intensive Crop As Part Of A Long Tradition Of Raisin Growing In California, And They Suffer A Substantial And Disproportionate Burden Under The Raisin Marketing Order.

The Raisin Marketing Order mandates a direct, physical taking of the Growers' raisin crops with no guarantee of compensation, let alone just compensation. Small, independent growers shoulder a disproportionate share of this substantial burden. Raisin handlers—corporations that buy the raisins from growers and pack and prepare the raisins for sale—receive compensation for the work required of them under the Order, while growers do not. Yet the Ninth Circuit panel insisted that raisin growers voluntarily assumed that burden, depicting raisin growing as a discrete "choice" that Petitioners and, by extension, *amici* Growers may lightly abandon in favor of alternative crops should they wish to escape the effects of the Order. As the panel blithely asserted, raisin growers could "avoid the reserve requirement of the Marketing Order by planting different crops, including other types of raisins, not subject to this Marketing Order or selling their grapes without drying them into raisins." *See* Pet. App. at 26a. For the Growers, however, that "choice" is really a livelihood requiring skill and long-term

commitment—a livelihood that once supported their families but, under the Raisin Marketing Order, often no longer can. Whatever kind of "choice" that may be, it is not one the Growers should be coerced into making by being forced to forgo just compensation for the taking of their property.

A. The Raisin Marketing Order Imposes A Significant And Disproportionate Burden With Little To No Benefit On Independent Growers.

As other courts and Petitioners have explained, the Raisin Marketing Order subjects raisin growers to a unique and "draconian" requirement that results in direct financial losses to their operations. *Evans v. United States*, 74 Fed. Cl. 554, 555 (2006), *aff'd*, 250 F. App'x 321 (Fed. Cir. 2007); *see* Pet. 4–7.

The raisin-growing cycle is such that raisin growers normally harvest their raisins in late August or September. The raisins are then delivered to raisin "handlers" in October and November who pack the raisins and prepare them for sale. In the first week of October of every year, the RAC establishes the preliminary "free tonnage" percentage that will apply to all raisin growers. *See Evans*, 74 Fed. Cl. at 557. This is the percentage of raisins for which the handlers actually pay raisin growers. The RAC establishes the "free tonnage" percentage based on its assessment of the quantity of raisins it believes the industry can sell worldwide. The remainder of the raisins are set aside as "reserve tonnage." Title to these raisins passes from the raisin growers to the RAC, and the handlers must physically segregate these raisins and hold them "for

the account" of the federal government ("reserve raisins"). 7 C.F.R. §§ 989.65, 989.66(a), (b)(1), (b)(4); *see Evans*, 74 Fed. Cl. at 557.[4] Handlers thus pay raisin growers only for the "free tonnage" of raisins they receive.

The RAC may then direct the reserve raisins held by the handlers wherever it sees fit. For example, the RAC may instruct that they be sold or sent as gifts to U.S. agencies, foreign governments, or charitable organizations, *id.* §§ 989.67(b)(2)–(4), or that they be disposed of in non-competitive secondary markets such as school lunch programs, *see id.* § 989.67. Alternatively, the RAC may sell reserve-tonnage raisins to handlers for resale in export markets. *See id.* §§ 989.67(c)–(e).

While raisin handlers receive compensation for segregating and storing the reserve tonnage each year, *see* 7 C.F.R. § 989.66(f), as well as export subsidies in certain cases, raisin growers receive no guaranteed level of compensation for the reserve raisins. Proceeds from the sale of the reserve raisins must first go to fund the RAC's own administrative

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[4] In computing the annual reserve tonnage, the RAC employs a method that "arbitrarily reduces the prior year's shipments by 10 percent." Raisin Production Manual 11 (L. Peter Christensen ed., University of California Agriculture & Natural Resources Communication Services (2000)). The RAC then offers the additional stock to handlers to enable them to maintain the same shipment volume as the previous year and to allow for market growth. "Any unsold tonnage from these offers remains in the reserve pool," *id.*, and therefore provides no separate basis for compensation to raisin growers.

costs. It is only after these costs have been paid that raisin growers receive any remaining proceeds, on a pro rata basis. *See* 7 C.F.R. § 608c(6)(E); 7 C.F.R. § 989.53(a), 989.66(h). In years for which there are no remaining proceeds, raisin growers receive no compensation at all for the reserve raisins.

Raisin growers must make substantial initial outlays and assume significant weather- and harvest-related risks well before early October when they first receive preliminary notice of the likely reserve tonnage requirement for the year's crops, *see* 7 C.F.R. § 989.54(b) (requiring announcement of preliminary free and reserve percentages by October 5 of each crop year, with a limited exception), and long before February 15 when they receive final notice of the year's reserve tonnage requirement, *see id.* § 989.54(d). In return, growers receive only an "equity interest" in the reserve raisins, which garners a return only after the RAC covers its own administrative costs and disburses any export subsidies to particular handlers from the net proceeds of the reserve tonnage. *See id.* § 989.66(h). In many years, this return fails to cover even the cost of production for the reserve tonnage. In some years, it is zero. *See* Pet. App. at 179a (reporting 47 percent reserve tonnage for crop year 2002–2003, which was sold at $970 per ton, but for which growers received no return). Therefore, although the Raisin Marketing Order technically applies only to handlers, *see* 7 C.F.R. §§ 989.65, 989.66(a), (b)(1), its negative impact is suffered almost exclusively by growers.

As a result of the Raisin Marketing Order, certain of the Growers who are *amici* here have been forced to sell vast swaths of their vineyards. Indeed, some have lost hundreds of acres of land. *See* App. A at 1a, 4a, 8a; James Bovard, *Why the California Raisins Have Stopped Singing*, The Wall Street Journal, May 26, 2014, *available at* http://online.wsj.com/news/articles/SB10001424052723044797045795798310389 06554 ("Many California farmers have shifted their land to other crops; the acreage devoted to raisin production has plunged since 2000."). These losses are attributable in part to the difficulties many of the Growers report in obtaining bank loans necessary to fund the cultivation of the next year's crops. *See* App. A at 1a, 4a. As one Grower explains, the reserve requirement "creates a complex system," and, consequently, "the banks don't like to work" with them. *Id.* at 5a.

To compensate for the loss of income resulting from the Raisin Marketing Order, most of the Growers have sought additional sources of income. Fifty years ago, one Grower recalls, "the farm raised the family." *Id.* at 4a. Now, however, many of the Growers rely on second jobs to cover some of the upfront expenses of cultivation and harvesting and, at bottom, to enable them to keep their land and their homes. *See id.* at 1a, 3a–4a. The Raisin Marketing Order "drastically lowers farm [and] family income," *id.* at 6a, makes it "[d]ifficult to make ends meet," *id.* at 5a, and denies the Growers the opportunity "to plan a future to improve [their] quality of life," *id.* at 4a. The Raisin Marketing Order thus imposes a significant burden on *amici*

Growers, and indeed on all raisin growers, depleting their resources and threatening their ability to continue their treasured family businesses.

B. The Growers' Small, Independent Operations Reflect Deep Personal Commitments In Addition To Substantial Financial Commitments.

The Ninth Circuit's insistence that raisin growers can avoid the draconian burdens of the Marketing Order simply by "planting different crops," or "selling their grapes without drying them into raisins," Pet. App. at 26a, reflects a fundamental misunderstanding of the nature of Petitioners' and the Growers' raisin-growing enterprises. "A raisin vineyard is a long-term investment," as a "new vineyard usually takes 3 years before it will bear a commercial crop." Raisin Production Manual at 64. The Growers have invested considerable amounts of time, money, and effort in their vineyards. For many Growers, their vineyards represent a much deeper personal investment as well. Passed down over generations, the vineyards themselves and the skills the Growers developed while tending them comprise a livelihood that the Growers should not have to abandon in order to avoid uncompensated takings of the literal fruits of their labors by the United States.

Overall, the U.S. raisin industry consists of some 3,000 growers located within the central San Joaquin Valley near Fresno, California. *See* California Raisins, The California Raisin Industry, http://calraisins.org/about/the-raisin-industry/ (last visited Oct. 2, 2014). These growers cultivate

approximately 200,000 acres and produce a total of approximately 350,000 tons of raisins in total each year, *see id.*, which amounts to almost 100 percent of the raisins produced in the United States and about 40 percent of raisins produced globally, *see* William L. Peacock & Frederick H. Swanson, *The Future of California Raisins Is Drying on the Vine*, Cal. Agric., Vol. 59, No. 2, at 70 (Apr.-June 2005), *available at* http://ucanr.edu/datastoreFiles/391-325.pdf. Over 90 percent of these raisins are of the "Thompson Seedless" variety, *see id.*, a variety subject to the Raisin Marketing Order, *see* 7 C.F.R. § 989.166.

The Growers' vineyards range from 18 to 240 acres. Notwithstanding this relatively small scale, however, the Growers bring significant skill and experience to their operations. On average, the eighteen Growers who are *amici* here have spent nearly 40 years each in the industry, and some more than 60. Moreover, most carry on raisin-growing businesses from prior generations. One is a third-generation raisin grower; two others are fourth-generation raisin growers; and yet another continues a family business of nearly 100 years. *See* App. A at 3a; *see also* Raisin Production Manual at 7 ("Originally, most raisin farms were family operations consisting of 20 to 40 acres . . . These origins are reflected in the industry today, with many family-oriented, relatively small farms still in existence.").

The length of time the Growers and their families have been engaged in the raisin growing business reflects both the substantial outlays required to

establish a vineyard and the intensive nature of the cultivation and harvesting of its raisins. A vineyard is a "long-term investment" because it typically takes at least three years before a vineyard will produce a commercial crop. Raisin Production Manual at 64. Even after the initial planting, raisin vineyards require careful management on an ongoing basis. Each year the Growers spend, on conservative estimates, an average of over $3,100 per acre to cultivate the grapes for their raisin crops. *See generally* App. A.[5] Their determinations of how much to invest in the cultivation of a given year's raisin crop entails experience-informed consideration of weather- and harvest-related risks. By necessity, such investment decisions must be made well before the Growers are notified of the RAC's reserve requirements for the year.

When the Growers' raisin crops are ready for harvesting in late August and early September, *see* Raisin Production Manual at 39 (describing harvest of Thompson Seedless grapes), the Growers undertake significant additional efforts to collect and dry the raisins before sending them to handlers for

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[5] *See also, e.g.*, University of California at Davis Cooperative Extension, Sample Costs to Produce Grapes for Raisins (2006), at 16 (estimating costs at between $3,338 and $3,668 per acre), *available at* https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0CCgQFjAB&url=http%3A%2F%2Fcoststudies.ucdavis.edu%2Ffiles%2Fgrraisctoldeqsjv06.pdf&ei=2q4yVKr9CNHlsAS-6oD4Dw&usg=AFQjCNEID0bMGruMQfQ9pXm0FHYHxxFUBQ&sig2=XN7jzTx20A3Pl9R_0Ozlrg&bvm=bv.76802529,d.cWc.

packing. Although new harvesting methods may be emerging, "[t]he traditional method of hand-harvesting and drying grapes on trays for natural raisins has changed little over the past hundred years." *See* Peacock & Swanson, *The Future of California Raisins Is Drying on the Vine*, Cal. Agric., Vol. 59, No. 2, at 70. "This process is labor intensive, requires close supervision and experienced management, and involves weather risks." *Id.* Indeed, California raisin harvesting "has traditionally been considered the most labor-intensive activity in North American agriculture." *California: Raisins, Parlier*, Rural Migration News, Vol. 11, No. 2 (Apr. 2005), *available at* https://migration.ucdavis.edu/rmn/more.php?id=976_0_2_0.

Therefore, by the time the RAC publishes the final "reserve tonnage" requirement in February, *see* 7 C.F.R. § 989.54(d), the Growers have already dedicated considerable amounts of time, money, and effort to the production of their raisin crops. Moreover, they have brought their experience to bear in careful crop management throughout the production process. Accordingly, the Growers reasonably expect to reap the full rewards of their investment and labor on the market. The "reserve tonnage" requirement decimates those expectations in even its lowest years. In the two years at issue in Petitioners' case, 2002–2003 and 2003–2004, the reserve requirement took 47 percent and 30 percent of the Growers' total crops, respectively. *See* Pet. App. 179a–180a. Thus, the Growers essentially gave one out of every two of the raisins they cultivated

and harvested to the government one year, and one out of every three raisins the next year. *See also id.* at 180a n.12 (citing 2005 requirement of 17.5 percent).

The Ninth Circuit panel's thoughtless suggestion that the Growers could avoid this blow to their livelihoods simply by growing different crops does not reflect reality. Given the accretive personal and financial resources the Growers have devoted to their raisin crops over the years, abandoning those crops would be a significant sacrifice. Moreover, such a course of action would prove financially prohibitive for most Growers. In contrast to "row" crops such as corn or wheat, raisin vineyards are difficult and costly to uproot and replace. The Growers estimate that it would cost hundreds of thousands of dollars to replace their entire raisin crops with alternative crops, not accounting for the amount of time they would have to wait before the new crops began to yield a return. *See generally* App. A. The panel's "choice" is thus a highly costly one at both ends, and one that implicates deep personal attachments to an inherited way of life. Accordingly, the panel could not reasonably have expected Petitioners or the Growers to relinquish that way of life, even if doing so would enable them to avoid the exceedingly onerous (and weakly justified) regulatory burden imposed by the Raisin Marketing Order.

* * *

As Justice Scalia observed during oral argument in a prior iteration of this case, the choice presented by the Raisin Marketing Order amounts to "your

raisins or your life." Transcript of Oral Argument at 31, *Horne v. U.S. Dep't of Agriculture*, 133 S. Ct. 2053 (2013) (Scalia, J.). In view of the actual conditions the Growers face under the Raisin Marketing Order, the panel's conclusion that Petitioners, and likewise the Growers, voluntarily accept the burdens of that Order simply by "choosing" to grow raisins cannot stand.

II. Contrary To The Ninth Circuit Panel's Decision, The Fifth Amendment Commands That The Growers Receive Just Compensation When The Government Takes Title To Their Raisin Crops.

This Court's review is needed to clarify that the illusory "choice" offered by the Ninth Circuit panel is no choice at all. The Ninth Circuit ultimately concluded that the reserve requirement did not effect a taking because "[a]t bottom" it was just "a use restriction applying to the Hornes insofar as they voluntarily choose to send their raisins into the stream of interstate commerce." Pet. App. 25a. But "choosing" to exercise one of the most fundamental rights in the bundle guaranteed by the Fifth Amendment—the right of alienation—cannot be conditioned upon surrendering just compensation for that choice.[6] The permanent, physical segregation

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[6] The right of alienation has long occupied a central place among the bundle of property rights the Fifth Amendment protects. *See, e.g.*, *Hodel v. Irving*, 481 U.S. 704, 716 (1987) ("[T]he right to pass on property . . . has been part of the Anglo-American legal system since feudal times."); William

and passage of title of a portion of Petitioners' and the Growers' raisin crop every year constitutes a *per se* taking for which they are constitutionally entitled to just compensation. This Court's precedent supports that conclusion, and other courts have accordingly embraced it. The Ninth Circuit's conclusion that the reserve requirement is no more than a use restriction is accordingly in direct conflict with the precedents of this Court and with those of other circuit courts.

The Ninth Circuit's erroneous "use restriction" holding rests on two bases, neither of which is defensible. First, the panel apparently believed that the Fifth Amendment's protections apply only to real and not personal property, and therefore a taking of personal property was not a taking at all. Second, the panel found no problem with the taking because it reasoned that Petitioners actually benefitted from surrendering their personal property to the government without just compensation. This Court must step in to ensure that the Ninth Circuit's dangerous takings rationales do not become entrenched in that circuit or others.

1. As Petitioners capably explain, the distinction drawn by the Ninth Circuit panel between real and personal property lacks support in the case law, *see* Pet. at 16–20, and the historical

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Blackstone, 2 *Commentaries* *447 ("Where the vendor hath in himself the property of the goods sold, he hath the liberty of disposing of them to whomever he pleases, at any time, and in any manner.").

origins of the Fifth Amendment, *see id.* at 20–22. But the panel's distinction also makes no sense in the context of this case. The Growers unquestionably have title to their raisin crops as personal property under California law. *See* Cal. Rev. & Tax. Code § 6016 ("'Tangible personal property' means personal property which may be seen, weighed, measured, felt, or touched, or which is in any other manner perceptible to the senses."); *see also* Cal. Com. Code § 2105(1) (defining "goods"). Pursuant to the Raisin Marketing Order, the Growers must transfer title to the RAC for a percentage of their raisins every year. A transfer of title from the Growers to the federal government unquestionably deprives the Growers of their property. Thus, characterizing the raisins as "personal property" does not make the taking of the raisins any less a taking.

Moreover, the panel's semantics notwithstanding, there is no practical difference between a "reserve tonnage" of the Growers' raisins and a reserve acreage of the Growers' vineyards. If the Raisin Marketing Order specified a number of acres of land—that is, real property—that the Growers were required to cordon off from the acres from which they could sell raisins on the free market, then the Ninth Circuit panel would have been forced to reach the opposite conclusion. In that case, there would be no plausible distinction whatsoever between the Raisin Marketing Order and the taking this Court found in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), where state law had required a landlord to permit cable installations on his rental

property. Concluding that the cable installations were "a minor but permanent physical occupation of an owner's property," the Court held that they constituted a taking and therefore entitled the landlord to compensation. *See Loretto*, 458 U.S. at 421. No matter how small the reserve requirement, therefore, an order mandating that the Growers physically cordon off part of their acreage for the government's use would constitute no less of a "physical occupation" than the cable installation requirement in *Loretto*.

Equally analogous to the cable installation requirement in *Loretto*, the "reserve tonnage" requirement cuts through every strand in the traditional bundle of property rights—ownership, possession, use, and disposal—that the Growers hold in the reserve raisins. The Growers relinquish their title to, and physical possession of, the reserve raisins to the government, and they lose control over the use and disposal of the raisins from that point on. "[S]uch a physical occupation of property is," quite simply, "a taking." *Loretto*, 458 U.S. at 421. The fact that they may receive some compensation for the reserve raisins, contingent on factors entirely beyond their control, in no way diminishes the taking that has occurred; it only raises the question of whether the offered compensation is just.

2. The Ninth Circuit's conclusion that the Raisin Marketing Order is a valid "use regulation" rather than a "physical occupation" because of some purported benefit to the raisin growers is no more defensible. Pet. App. at 22a (finding that the reserve

raisins' "disposition, while tightly controlled, inures to [Petitioners'] benefit"). This Court has never endorsed the argument that a nebulous "benefit" associated with a taking can substitute for the just compensation required by the Fifth Amendment. Indeed, if that were the case, the scheme specifically proscribed in *Loretto*—the "requisition [of] a certain number of apartments" in a rental building "as permanent government offices," 458 U.S. at 439 n.17—would be permissible provided that the government's occupation constricted the rental market supply and thereby propped up rental prices to the benefit of the landlord. As the Court concluded in *Loretto*, however, "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation." *Id.* Accordingly, even though "*Loretto* specifically preserve[d] the state's 'substantial authority' and 'broad power to impose appropriate restrictions on an owner's use of his property,'" Pet. App. 22a (quoting *Loretto*, 458 U.S. at 441), it did not do so at the expense of the Fifth Amendment.

This Court has made clear that there is no "blanket exception to the Takings Clause whenever Congress exercises its Commerce Clause authority." *Kaiser Aetna v. United States*, 444 U.S. 164, 172 (1979). The Ninth Circuit panel's attempt to contort the Raisin Marketing Order into a mere "use restriction," or a condition on entry into interstate commerce, *see* Pet. App. at 25a, amounts to an attempt to negate that statement. *See Loretto*, 458 U.S. at 425 ("It is a separate question . . . whether an otherwise valid regulation so frustrates property

rights that compensation must be paid."). It also puts the Ninth Circuit at odds with other circuits, such as the Eleventh Circuit, on this issue. *See, e.g., Gulf Power Co. v. United States*, 187 F.3d 1324, 1331 (11th Cir. 1999) ("Characterizing the mandatory access provision as a regulatory condition, even one allegedly designed to foster competition, cannot change the fact that it effects a taking by requiring a utility to submit to a permanent, physical occupation of its property. However laudatory its motive, Congress' power to regulate utilities does not extend to taking without just compensation the right of a utility to exclude unwanted occupiers of its property."). This Court's review is needed to clarify that when the government takes title to, and physical possession of, property—whether real or personal, and regardless of the regulatory justification—a taking has occurred and just compensation must be paid.

III. Absent Review, The Ninth Circuit's Decision May Have Sweeping Ramifications With Debilitating Impacts On Agricultural And Other Small Producers.

Though unique in certain respects, the Raisin Marketing Order bears resemblance to many other agricultural orders with significant impacts in California. Should the Court allow the Ninth Circuit's erroneous Takings Clause analysis to stand, that analysis could infect regulation of other crops upon which the region is heavily—and proudly—dependent. The decision thus holds much greater

significance than its immediate outcome for Petitioners and the Growers.

The Raisin Marketing Order imposes the most "draconian" burden of all the agricultural marketing orders now in effect. *Evans*, 74 Fed. Cl. at 555. Unlike the marketing orders for almonds, walnuts, tart cherries, prunes, and spearmint oil, for example, it "effects a direct transfer of title of a producer's 'reserve tonnage' raisins to the government, and it requires physical segregation of the reserve-tonnage raisins held for the government's account." *Id.* at 558 (citing 7 C.F.R. §§ 989.54, 989.65, 989.66(b)(2), (4)); *cf.* 7 C.F.R. § 981.52 (requiring almond handlers to "hold in [*their*] possession or under [*their*] control, in proper storage for the account of the Board, the quantity of almonds necessary to meet his reserve obligation"); *id.* §§ 993.57, 993.54 (imposing similar requirement on prune handlers); *Prune Bargaining Ass'n v. Butz*, 444 F. Supp. 785, 788–89 (N.D. Cal. 1975) ("These reserve prunes are not physically segregated from the salable prunes, however, and thus the reserve is, in fact, a paper reserve.").

Nonetheless, the Raisin Marketing Order shares certain features with marketing orders for other agricultural products. *See Evans*, 74 Fed. Cl. at 555. The RAC is one of many industry committees with the power to sell or dispose of reserves held for the government's account. *See* 7 C.F.R. §§ 981.66(a) (almonds); 984.56(a) (walnuts), 993.65(a) (prunes). Additionally, like raisin producers, producers of almonds, walnuts, and prunes receive only a pro rata share of any net proceeds from the sale of their

reserve crops. *See* 7 C.F.R. §§ 981.66(e) (almonds), 984.56(e) (walnuts), 993.65(e) (prunes). The panel's decision affords no basis for distinguishing the marketing orders for other crops from the Raisin Marketing Order for purposes of its Takings Clause analysis. Therefore, it would require little effort for the Department of Agriculture to ratchet up the marketing restrictions for other crops to the most "draconian" level, *Evans*, 74 Fed. Cl. at 555, and take title to and physical possession of these other crops' reserves as well.

All of those crops, moreover, grow mostly in California, under the Ninth Circuit's jurisdiction.[7] Thus, the Ninth Circuit's decision sets up the anomalous situation in which the Fifth Amendment protections recognized in other jurisdictions, such as the Eleventh Circuit, would be available to Florida orange growers, but of no avail to California orange growers. Equally without protection would be other industries located within the bounds of the Ninth

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[7] *See* Agricultural Marketing Resource Center, *Almond Profile*, http://www.agmrc.org/commodities__products/nuts/almond-profile/ (last visited Oct. 6, 2014) ("California is the only state that produces almonds commercially."); Agricultural Marketing Resource Center, *English Walnuts Profile*, http://www.agmrc.org/commodities__products/nuts/english-walnuts-profile/ (last visited Oct. 6, 2014) ("California produces 99 percent of the nation's commercial English walnuts."); Agricultural Marketing Resource Center, *Prunes Profile*, http://www.agmrc.org/commodities__products/fruits/prunes-profile/ (last visited Oct. 6, 2014) ("Today, California produces 99 percent of U.S. prunes.").

Circuit. As Petitioners noted below, the panel's reasoning would allow the government to "require a manufacturer of microchips to turn over 50 percent of its manufactured goods for government use, if the manufacturer sells those chips in interstate commerce." Petition for Panel Rehearing or Rehearing En Banc at 21, *Horne v. U.S. Dep't of Agric.*, No. 10-15270 (9th Cir. Sept. 8, 2011). Meanwhile, industries in Florida and other states under the Eleventh Circuit's jurisdiction will retain the full protection of the Fifth Amendment. *See* Pet. at 31–32 (discussing circuit split); *Gulf Power Co.*, 187 F.3d at 1331. The Court's clarification of the scope of that protection is sorely needed to remedy this disparity and prevent further uncompensated takings within the Ninth Circuit.

CONCLUSION

As one of the Growers expresses, the Growers simply want independence and a "chance to live the American dream" free of the burdens imposed by the Raisin Marketing Order. App. A at 9a. For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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October 8, 2014

APPENDIX

APPENDIX A

INDEPENDENT RAISIN GROWERS

1. Walter A. Shubin operates a raisin vineyard under the name Shubin Farms. He farms 20 acres of raisins and has been producing raisins for 64 years. His family has been in the raisin growing business for 78 years. From the time Mr. Shubin completes one year's raisin harvest to the time the next harvest begins, he spends approximately $2,500 to $3,000 per acre on cultural costs.[1] As a result of the Raisin Marketing Order, Mr. Shubin has lost approximately 180 raisin acres in the last twenty plus years. The possibility of a reserve requirement also makes it difficult for Mr. Shubin to obtain bank loans to finance his next crop season. Mr. Shubin and his wife have secured second jobs in order to keep their land and their home.

2. Harris Daggs farms 79 acres of raisins and has been producing raisins for 18 years. His family has been in the raisin growing business for 40 years. Mr. Daggs estimates the cost of removing his raisin vineyard acreage and planting another crop amenable to his soils would be $175,000. As a result of the Raisin Marketing Order, Mr. Daggs has been forced to take a full-time job to support the farm.

3. Chris C. Gauss operates a raisin vineyard under the name Gauss Ranches. He farms 40 acres of raisins and has been producing raisins for 39

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[1] "Cultural costs" include the costs of pruning, fertilizing, and irrigating the crop, as well as the costs of weed, insect, and disease control.

years. His family has been in the raisin growing business for 90 years. From the time Mr. Gauss completes one year's raisin harvest to the time the next harvest begins, he spends approximately $3,000 per acre on cultural costs. Mr. Gauss estimates the cost of removing his raisin vineyard acreage and planting another crop amenable to his soils would be $25,000. The possibility of a reserve requirement also makes it difficult for Mr. Gauss to obtain bank loans to finance his next crop season.

4. John Radovich operates a raisin vineyard under the name Radovich Farms. He farms 18 acres of raisins and has been producing raisins for 26 years. His family has been in the raisin growing business for over 50 years. From the time Mr. Radovich completes one year's raisin harvest to the time the next harvest begins, he spends approximately $2,000 per acre on cultural costs. Mr. Radovich estimates the cost of removing his raisin vineyard acreage and planting another crop amenable to his soils would be $20,000, noting that he would have to wait until the new crop produces. The possibility of a reserve requirement also makes it difficult for Mr. Radovich to obtain bank loans to finance his next crop season. For many years under the Raisin Marketing Order, Mr. Radovich did not receive any payment for his reserve raisins, making it difficult to cultivate the following year's crop.

5. Jack Blehm farms 60 acres of raisin vineyard and has been producing raisins since 1972. His family has been in the raisin growing business since 1942. From the time Mr. Blehm completes one year's

raisin harvest to the time the next harvest begins, he spends approximately $3,000 to $3,800 per acre on cultural costs. Mr. Blehm conservatively estimates the cost of removing his raisin vineyard acreage and planting another crop amenable to his soils would be $20,000 per acre. Mr. Blehm works a second job to help pay the bills and compensate for the loss of income resulting from the Raisin Marketing Order.

6. Roger Blehm farms 60 acres of raisin vineyard and has been producing raisins for 8 years. His family has been in the raisin growing business for 71 years. From the time Mr. Blehm completes one year's raisin harvest to the time the next harvest begins, he spends approximately $3,800 to $4,000 per acre on cultural costs. Mr. Blehm estimates the cost of removing his raisin vineyard acreage and planting another crop amenable to his soils would be $25,000 per acre. Mr. Blehm works a second job to help compensate for the loss of income resulting from the Raisin Marketing Order.

7. Arleen G. Daggs farms 70 acres of raisin vineyard. Her family has been in the raisin growing business since 1917. From the time Ms. Daggs completes one year's raisin harvest to the time the next harvest begins, she spends approximately $2,500 per acre on cultural costs. Ms. Daggs estimates the cost of removing her raisin vineyard acreage and planting another crop amenable to his soils would be a minimum of $25,000 per acre, not including the loss of income for three years. Ms. Daggs works a second job to help pay some of the expenses associated with the culture and harvest of

the crops. She notes that "since 1964" she has always had to have a second job, whereas "[b]efore that the farm raised the family." Without a very large farming operation and significant diversification, she concludes, raisin farming has become only a hobby.

8. Earl O. Boyajian farms 98 acres of raisin vineyard and has been producing raisins for 67 years. His family has been in the raisin growing business for 94 years. From the time Mr. Boyajian completes one year's raisin harvest to the time the next harvest begins, he spends more than $1,000 per acre on cultural costs. Mr. Boyajian estimates the cost of removing his raisin vineyard acreage and planting another crop amenable to his soils would be significant. As a result of the Raisin Marketing Order, Mr. Boyajian has lost approximately 130 raisin acres in the last twenty plus years. The possibility of a reserve requirement also makes it difficult for Mr. Boyajian to obtain bank loans to finance his next crop season. Mr. Boyajian notes that, under the Raisin Marketing Order, he "can never plan a future to improve [his] quality of life" — "[n]o truck, no equipment, no household improvements." He asks that the RAC "at least give" the growers "[their] cultural costs back."

9. Nick Goosev farms 33 acres of raisin vineyard and has been producing raisins for 31 years. His family has been in the raisin growing business for 65 years. From the time Mr. Goosev completes one year's raisin harvest to the time the next harvest begins, he spends approximately $1,200

per acre on cultural costs. Mr. Goosev estimates the cost of removing his raisin vineyard acreage and planting another crop amenable to his soils would be $30,000 to $40,000. As a result of the Raisin Marketing Order, Mr. Goosev has lost approximately 15 raisin acres in the last twenty plus years. Under the Raisin Marketing Order, Mr. Goosev can "barely make it every year."

10. Bryan Arabian operates a raisin vineyard under the name Arabian Farms. He farms 170 acres of raisins and has been producing raisins since 1949 as a fourth-generation raisin grower. From the time Mr. Arabian completes one year's raisin harvest to the time the next harvest begins, he spends approximately $4,000 per acre on cultural costs. Mr. Arabian estimates the cost of removing his raisin vineyard acreage and planting another crop amenable to his soils would be $25,000 per acre. The Raisin Marketing Order "creates a complex system and the banks don't like to work w[ith]" them.

11. David Baer farms 20 acres of raisin vineyard and has been producing raisins for over 30 years as a third-generation raisin grower. From the time Mr. Baer completes one year's raisin harvest to the time the next harvest begins, he spends significant resources on cultural costs. The possibility of a reserve requirement makes it difficult for Mr. Baer to obtain bank loans to finance his next crop season. The Raisin Marketing Order also makes it "difficult to make ends meet."

12. Harjinder S. Gill farms 160 acres of raisin vineyard and has been producing raisins for 36 years

as a first-generation immigrant. From the time Mr. Gill completes one year's raisin harvest to the time the next harvest begins, he spends approximately $1,500 per acre on cultural costs. Mr. Gill estimates the cost of removing his raisin vineyard acreage and planting another crop amenable to his soils would be $5,000 per acre. As a result of the Raisin Marketing Order, Mr. Gill has lost 20 raisin acres in the last twenty plus years. He has not been turned down for a bank loan because his operation is diversified, but he notes that he "do[es] not even get [his] cost of production back" for the reserve raisins.

13. Brad Hansen operates a raisin vineyard under the name Brad Hansen Farm. He farms 240 acres of raisins and has been producing raisins for 34 years as a fourth-generation farmer. From the time Mr. Hansen completes one year's raisin harvest to the time the next harvest begins, he spends approximately $1,500 per acre on cultural costs. Mr. Hansen estimates the cost of removing his raisin vineyard acreage and planting another crop amenable to his soils would be $5,000 per acre, and he notes that he would replace the raisin crop with almonds. As a result of the Raisin Marketing Order, Mr. Shubin has lost approximately 40 raisin acres in the last twenty plus years. The reserve requirement "drastically lowers [his] farm/family income."

14. Loren T. Linscheid (Tom) operates a raisin vineyard under the name Linscheid Organic Farm. He farms 40 acres of raisins and has been producing raisins for 20 years. His family has been in the raisin growing business for 60 years. From the time

Mr. Linscheid completes one year's raisin harvest to the time the next harvest begins, he spends approximately $3,000 per acre on cultural costs. Mr. Linscheid estimates the cost of removing his raisin vineyard acreage and planting another crop amenable to his soils would be $10,000 per acre. As a result of the Raisin Marketing Order, Mr. Linscheid has lost approximately 40 raisin acres in the last twenty plus years. The possibility of a reserve requirement also makes it difficult for Mr. Linscheid to obtain bank loans to finance his next crop season. He believes that "no one would go into [the] raisin business today with th[ese] . . cultural costs and [this] economic climate."

15. Wayne Snell farms 27 acres of raisins and has been producing raisins for 43 years. From the time Mr. Snell completes one year's raisin harvest to the time the next harvest begins, he spends approximately $2,800 per acre on cultural costs. Mr. Snell estimates the cost of removing his raisin vineyard acreage and planting another crop amenable to his soils would be $45,000. As a result of the Raisin Marketing Order, Mr. Snell has lost 29.5 raisin acres in the last twenty plus years. The possibility of a reserve requirement also makes it difficult for Mr. Snell to obtain bank loans to finance his next crop season.

16. Tom Pavich and Frances Pavich operate a raisin vineyard under the name FMP Vineyards. They farm 80 acres of raisins and have been producing raisins for 25 years. They are second-generation raisin growers, and their family has been

in the business for 61 years. From the time the Paviches complete one year's raisin harvest to the time the next harvest begins, they spend approximately $2,500 per acre on cultural costs. The Paviches estimate the cost of removing his raisin vineyard acreage and planting another crop amenable to his soils would be $800,000. As a result of the Raisin Marketing Order, the Paviches have lost hundreds of raisin acres in the last twenty plus years. The possibility of a reserve requirement also makes it difficult for the Paviches to obtain bank loans to finance their next crop season, and they have been turned down for loans in the past. In an effort to sell all of the organic raisins they grow, the Paviches have been "forced to buy conventional raisins to substitute for [their] organic raisins on years there was a reserve."

17. David Hernandez operates a raisin vineyard under the name Mi Tierra Vineyard. He farms 20 acres of raisins and has been producing raisins for 12 years. From the time Mr. Hernandez completes one year's raisin harvest to the time the next harvest begins, he spends approximately $1,000 per acre on cultural costs. Mr. Hernandez estimates the cost of removing his raisin vineyard acreage and planting another crop amenable to his soils would be $25,000. The possibility of a reserve requirement makes it difficult for Mr. Hernandez to obtain bank loans to finance his next crop season.

18. Robert Z. Gonzalez operates a raisin vineyard under the name Gonzalez Farms. He farms 50 acres of raisins and has been producing raisins

since 1966. From the time Mr. Gonzalez completes one year's raisin harvest to the time the next harvest begins, he spends approximately $3,000 per acre on cultural costs. Mr. Gonzalez estimates the cost of removing his raisin vineyard acreage and planting another crop amenable to his soils would be $850,000 just for 20 acres. As a result of the Raisin Marketing Order, Mr. Gonzalez has lost 20 raisin acres in the last twenty plus years. The possibility of a reserve requirement also makes it difficult for Mr. Gonzalez to obtain bank loans to finance his next crop season. Mr. Gonzalez expresses his desire simply for independence and "a chance to live the American dream."

No. 14-275

Supreme Court, U.S.
FILED
OCT - 8 2014
OFFICE OF THE CLERK

In The

Supreme Court of the United States

MARVIN D. HORNE, *et al.*,

Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the government's "categorical duty" under the Fifth Amendment to pay just compensation when it "physically takes possession of an interest in property," *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012), applies only to real property and not to personal property.

2. Whether the government may avoid the categorical duty to pay just compensation for a physical taking of property by reserving to the property owner a contingent interest in a portion of the value of the property, set at the government's discretion.

3. Whether a governmental mandate to relinquish specific, identifiable property as a "condition" on permission to engage in commerce effects a per se taking.

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.2, Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Petitioners.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

MSLF is a nonprofit, public-interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. MSLF has members who reside, own property, and work in all 50 states. Since its creation in 1977, MSLF attorneys have defended individual liberties and been active in litigation opposing governmental actions that result in takings of private

[1] Pursuant to Supreme Court Rule 37.2(a), notice of MSLF's intent to file this amicus curiae brief was received by counsel of record for all parties at least 10 days prior to the due date of this brief and all parties consent to the filing of this amicus curiae brief. The undersigned further affirms that no counsel for a party authored this brief in whole or in part, and no person or entity, other than MSLF, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

property without just compensation. *See, e.g.*, *Brandt v. United States*, 710 F.3d 1369 (Fed. Cir. 2013) (represented Plaintiff); *Laguna Gatuna, Inc. v. United States*, 50 Fed. Cl. 336 (Fed. Cl. 2001) (represented Plaintiff); *Mountain States Legal Foundation v. Hodel*, 799 F.2d 1423 (10th Cir. 1986) (Plaintiff); *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (amicus curiae); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (amicus curiae); *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276 (Fed. Cir. 2008) (amicus curiae).

Moreover, MSLF has a tangible interest in this case. The right to own and use personal property is central to many MSLF members' ability to earn a livelihood. Therefore, MSLF respectfully submits this amicus curiae brief, urging that the Court grant the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

This case involves a marketing order promulgated under the Agricultural Marketing Agreement Act of 1937 ("AMAA"), as amended, 7 U.S.C. § 601 *et seq.* In 1949, the Department of Agriculture implemented the *Marketing Order Regulating the Handling of Raisins Produced from Grapes Grown in California*, 7 C.F.R. § 989 (1993) ("Raisin Marketing Order"). The Raisin Marketing Order is implemented by the Raisin Administrative Committee ("RAC"), an agent of the USDA.

Unlike other marketing orders promulgated under the AMAA, the Raisin Marketing Order requires raisin handlers – those who process, pack, and ship raisins – to transfer title to a significant portion of raisins received from producers to the RAC, referred to as "reserved tonnage raisins."[2] *See* RAC, *Marketing Policy and Industry Statistics, 2010*, at 27, *available at* http://www.raisins.org/files/Marketing%20Policy%202010.pdf (last visited Sep. 26, 2014) ("Marketing Policy"). The percentage of a crop set aside as reserved tonnage raisins is set by the RAC in February of each crop year. 7 C.F.R. §§ 989.21, 989.54(d). The RAC then has complete control over the reserved tonnage raisins. It may sell the raisins to handlers for resale in export markets, *id.* at §§ 989.67(c), (e), or may sell or donate the raisins to foreign governments, United States governmental agencies, or charitable organizations. *Id.* at §§ 989.67(b)(2)-(4). The proceeds from these sales go to fund the RAC, provide export subsidies to favored handlers, and, if anything is left

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[2] The raisins that handlers are allowed to keep are referred to as "free tonnage raisins," and may be sold on the open market. 7 C.F.R. § 989.65. Although the handlers bear the obligation to transfer the reserved tonnage raisins to the RAC, handlers pay producers only for free tonnage raisins and producers are thus uncompensated for the taking. *Id.* at §§ 989.65, 989.66(a). Petitioners here produced at least some of the raisins at issue, and were also determined to be "handlers" for purposes of the Raisin Marketing Order because they processed the raisins they produced. *See Horne v. U.S. Dep't of Agric.*, 673 F.3d 1071, 1078 (9th Cir. 2011) ("*Horne I*"), *as amended on reconsideration* (Mar. 12, 2012), *rev'd sub nom. Horne v. Dep't of Agric.*, 133 S. Ct. 2053 (2013).

over, distributed to producers on a *pro rata* basis. 7 U.S.C. § 608c(6)(E); 7 C.F.R. §§ 989.53(a), 898.66(h).

In the crop years at issue here, 2002-2003 and 2003-2004, the RAC required farmers to turn over 47 percent and 30 percent of their raisin crops, respectively. *Marketing Policy* at 27. In 2002-2003, the RAC remitted a small portion of the proceeds to producers, well below the cost of production, and not even close to fair market value. RAC, *Analysis Report* 22 (Aug. 1, 2006), *available at* http://www.raisins.org/analysis_report/analysis_report.pdf (last visited Oct. 1, 2014). In 2003-2004, the RAC remitted no portion of the proceeds to producers. *Id.* at 23, 55.

Petitioners, life-long raisin farmers, purchased equipment to sort, process, and pack their own raisins. *Horne v. Dep't of Agric.*, 133 S. Ct. 2053, 2058 (2013). They also allowed other farmers in the area to use their equipment for a per-ton fee. Petitioners did not believe they were subject to the "handler" requirements of the Raisin Marketing Order. *Id.* at 2059; Petition at 132a-133a. On April 1, 2004, the USDA initiated an enforcement action against Petitioners for their failure to set aside reserved tonnage raisins in crop years 2002-2003 and 2003-2004, and assessed significant fines and penalties. Petition at 30a-31a; *Horne*, 133 S. Ct. at 2059; 7 U.S.C. §§ 608a(5), 608c(14); 7 C.F.R. § 989.166(c). These fines and penalties consisted of both the dollar equivalent of the raisins' fair market value, $483,843.53, and

$202,600 in civil penalties.[3] Petition at 10, 98a, 122a. As this Court previously held in *Horne*, 133 S. Ct. at 2064, Petitioners properly raised a takings-based defense in the USDA's enforcement proceeding. On remand from this Court, the Ninth Circuit ruled on the merits of Petitioners' takings claim, determining that no taking had occurred. *Horne v. U.S. Dep't of Agric.*, 750 F.3d 1128 (9th Cir. 2014) ("*Horne II*").

SUMMARY OF ARGUMENT

The Ninth Circuit determined that, because the government did not physically invade Petitioners' land and take their raisins, but merely required a transfer of title of those raisins under the Raisin Marketing Order, a physical takings analysis was inappropriate. *Horne II*, 750 F.3d at 1138. The Ninth Circuit then applied a regulatory takings analysis, relying on a mixture of traditional regulatory takings cases and land-use restriction cases. *Id.* at 1138-44. The panel's holding that no taking occurred was based in significant part on its *ad hoc*, factual findings that: (1) Petitioners benefit from regulation under the Raisin Marketing Order; (2) Petitioners retained a theoretical equitable stake in reserved

[3] Petitioners were fined not only for the fair market value of the raisins they produced and sold, but the fair market value of the raisins of other farmers who had utilized Petitioners' equipment. Petition at 10-11.

tonnage raisins under the Raisin Marketing Order; and (3) the Raisin Marketing Order provides important public benefits by "smoothing the raisin supply curve." *Id.* at 1132, 1140-41.

The Ninth Circuit's analysis is clearly illogical when applied to the taking complained of here – a direct, compelled transfer of title to the RAC. First, property interests such as those at issue here have been protected from governmental interference since the founding of the Republic. Second, transfer of title to the government is not a "conditional[ ] grant [of] a government benefit in exchange for an exaction," *id.* at 1143, but rather, a complete deprivation of property without just compensation. Third, any regulatory "benefits" that inure to Petitioners as a result of the Raisin Marketing Order do not obviate the physical taking. Fourth, the theoretical equitable stake retained by Petitioners does not obviate the physical taking. Finally, any generalized benefit that inures to the public as a result of the Raisin Marketing Order is merely a prerequisite to the government's exercise of its taking power, not the end of the inquiry. The Ninth Circuit's unprecedented interpretation of this Court's takings jurisprudence necessitates granting the Petition.

REASONS FOR GRANTING THE PETITION

I. THE RIGHT TO OWN PROPERTY IS ESSENTIAL TO SECURE LIBERTY.

Property rights in America can be traced to the Magna Charta (1215), which provides: "[n]o freeman shall be taken or imprisoned, or disseised of his free tenement or of his liberties or free custom unless by the lawful judgment of his peers, or by the law of the land." *See United States v. Lee*, 106 U.S. 196, 228 (1882) (The Magna Charta is "the origin of the provision, embodied in the fifth amendment of the constitution of the United States, that no man shall be deprived of life, liberty, or property without due process of law.") (Gray, J., dissenting); *Hutardo v. People of State of Cal.*, 110 U.S. 516, 531-32 (1884) (as "the provisions of *Magna Charta* were incorporated into bills of rights," they became "bulwarks" to guarantee "not particular forms of procedure, but the very substance of individual rights to life, liberty, and property.").

From the very beginning, the framers of the Constitution recognized that "property ownership [is] a buffer protecting individuals from government coercion." James W. Ely, *The Guardian of Every Other Right: A Constitutional History of Property Rights* 43 (2d ed., 1998). At its core, property ownership gives individuals freedom from government's dictation of every aspect of their lives. D. Benjamin Barros, *Property and Freedom*, 4 NYU J.L. & Liberty 36, 51-52 (2009) (explaining that, in a system without property

or markets, determinations of how various resources are allocated "must now be made by governmental authorities") (citing Charles Lindblom, *Politics and Markets* 50 (1977)). When the Fifth Amendment was incorporated into the Constitution in 1791, it incorporated two important property guarantees, along with procedural safeguards governing criminal trials:

> The amendment provides in part that no person shall be "deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." [James] Madison's decision to place this language next to criminal justice protections, such as the prohibitions against double jeopardy and self-incrimination, underscored the close association of property rights with personal liberty. Individuals needed security against both arbitrary punishment and deprivation of property.

The Guardian of Every Other Right 54 (quoting U.S. Const. amend. V).

For over 200 years, this Court has continued to recognize the importance of both personal and real property rights as essential to maintaining liberty. *See Monogahela Nav. Co. v. United States*, 148 U.S. 312, 344-45 (1893) (Awarding compensation to a navigation company for the government's taking of a "lock and dam" on a river and its "vested franchise to receive tolls for its use; that such franchise was as much a vested right of property as ownership of the

tangible property. "); *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 235-36 (1897) ("The requirement that the property shall not be taken for public use without just compensation is but 'an affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down as a principle of universal law. Indeed, in a free government, almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every cit[i]zen.'") (quoting 2 Story, Const. § 1790). Indeed, interference with property rights is "'the kind of interference with autonomy that centrally threatens people's control over their lives.' It is difficult to see how other freedoms to speech, religion, or association could be secure in a society without the institution of private property." *Property and Freedom* 69 (quoting Liam Murphy & Thomas Nagel, *The Myth of Ownership: Taxes and Justice* 65 (2002)); *see also Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972) ("[A] fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.").

II. A TRANSFER OF TITLE TO PROPERTY EFFECTUATES A PHYSICAL TAKING.

In the proceedings below, the Ninth Circuit acknowledged that the Raisin Marketing Order requires handlers to transfer title to a significant

portion of producers' crops to "'the account of the [RAC].'" *Horne II*, 750 F.3d at 1134 (quoting 7 C.F.R. § 989.66(a)) (alteration in original). The transfer is so complete that the RAC compensates handlers for preparing reserved tonnage raisins for sale or transfer. *Id.* The RAC also has the option of selling the raisins *back to* handlers for sale on export markets. 7 C.F.R. § 989.67(c), (e). Nonetheless, the panel held that no physical taking occurred "[b]ecause the government neither seized any raisins from the Hornes' land nor removed any money from the Hornes' bank account." [4] *Id.* at 1138.

The Ninth Circuit erred in attempting to so limit the Takings Clause. A transfer of title to property (real and personal) effectuates a physical taking. *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 522 (1992) ("Where the government authorizes a physical occupation of property (or actually takes title), the Takings Clause generally requires compensation."); *R & J Holding Co. v. Redevelopment Authority of County of Montgomery*, 670 F.3d 420, 431 (3d Cir. 2011)

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[4] The Ninth Circuit also charted new territory with its assertion that personal property is not entitled to the same protections as real property under the Takings Clause. *Horne II*, 750 F.3d at 1139-40. As Petitioners have demonstrated, such a distinction is nonsensical. Petition at 15-26. Furthermore, it directly conflicts with precedent in other circuits. *See, e.g., Yancey v. United States*, 915 F.2d 1534, 1541 (Fed. Cir. 1990) ("For Fifth Amendment purposes, the Yanceys' ownership of their turkey flock deserves just as much protection as if ownership of their farm had been appropriated.").

("Practice involving federal government takings confirms that transfer of title is a *watershed moment.*") (emphasis added). The fact that Petitioners were responsible for transferring title from producers to the RAC makes no difference. *See Forest Properties, Inc. v. United States*, 177 F.3d 1360, 1364 (Fed. Cir. 1999) ("A physical taking occurs where the government .. '*requires* the landowner to submit to physical occupation of its land,' whether by the government or a third party.") (quoting *Yee*, 503 U.S. at 527) (emphasis in original) (internal citations omitted). The fact that the Raisin Marketing Order required only a portion of each raisin crop to be transferred to the RAC does not diminish the fact that it effectuated a complete taking of 30 and 47 percent of producers' raisins in the crop years at issue. *See Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560, 1569 (Fed. Cir. 1994) ("[I]f the Government took just 5 acres and left the property owner with 95, there would be no question that the owner was entitled to compensation for the parcel taken. ."); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 437-38 (1982) (holding that even a relatively minor physical occupation of an owner's property constitutes a taking).

Whenever the government "physically takes possession of an interest in property" for a public purpose, it has a "categorical duty" to pay just compensation. *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012) (internal quotations omitted). Whether the RAC snatched raisins from

producers' hands itself or merely implemented regulations requiring transfer of title to the RAC, its action here clearly constituted a physical taking.

III. THE NINTH CIRCUIT ERRED IN APPLYING A REGULATORY TAKINGS ANALYSIS TO A CLASSICAL PHYSICAL TAKING.

The Ninth Circuit justified its holding that no taking occurred based, in part, on the rationales that the RAC secures "benefits" for producers "such as the Hornes" and "the Hornes did not lose all economically valuable use of their personal property." *Horne II*, 750 F.3d at 1140-41. The panel also held that the government demonstrated a "nexus and rough proportionality" between the Raisin Marketing Order and its public interest justification. *Id.* at 1141-42. These justifications were directly tied to the panel's attempt to apply a regulatory takings analysis to a classical physical taking.[5]

As demonstrated below, any alleged "benefits" secured to Petitioners by the Raisin Marketing Order are completely irrelevant in the context of a physical takings claim. Additionally, a physical taking occurred regardless of whether the Raisin Marketing

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[5] As Petitioners aptly demonstrate, the Ninth Circuit's attempt to treat seizure of title a "use restriction" under *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan*, 512 U.S. at 374, has no support in this Court's precedents. Petition at 29-36.

Order reserved to handlers a nearly-worthless equitable stake in the reserved tonnage raisins. Finally, in a physical takings case, the government's demonstration of a public interest is a prerequisite to exercising its takings power, not a rationale for finding that no taking occurred. *Kelo v. City of New London*, 545 U.S. 469, 477 (2005). The existence of a purported public interest does not eliminate the government's duty to pay just compensation.

A. The Ninth Circuit Erred In Determining That Any Purported Reciprocal Benefits Of Regulation Prevent The Raisin Marketing Order From Effectuating A Taking.

In determining that the Raisin Marketing Order does not effectuate a regulatory taking of handlers' raisins, the Ninth Circuit relied in part on the seminal regulatory takings case *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). *Horne II*, 750 F.3d at 1138-44. *Mahon* laid the foundation for what was later referred to as the "*Penn Central* factors" announced in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

Under the *Penn Central* rubric, a court determines whether a regulatory taking has occurred in the absence of a transfer of title by considering the following factors: (1) the "economic impact of the regulation on the claimant[;]" (2) "the extent to which the regulation has interfered with distinct

investment-backed expectations[;]" and (3) "the character of the governmental action." *Id.* at 124-25. Application of the *Penn Central* factors is, however, not appropriate where a regulation effects (1) a physical taking; or (2) a "'complete elimination of value'" in the property at issue. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 330 (2002) (quoting *Lucas*, 505 U.S. at 1019-20 n.8).

In assessing the "economic impact" factor, courts sometimes analyze whether the claimant received a reciprocal benefit of being regulated – *Mahon* referred to this as the "average reciprocity of advantage." 260 U.S. at 415 (explaining that the "requirement for the safety of employees invited into the mine . secured an average reciprocity of advantage that has been recognized as a justification of various laws"). Reciprocity is not a factor at all in physical takings cases, such as when title is transferred. *See Tahoe-Sierra*, 535 U.S. at 323. Additionally, even in a regulatory takings case, the "average reciprocity of advantage" rationale cannot be relied on where an individual pays "a much higher price for its benefit than .. other members of the community." *Florida Rock Industries, Inc. v. United States*, 45 Fed. Cl. 21, 37 (1999). In other words, partial compensation is required where the reciprocal benefits of regulation are less than the overall burden of regulation. *Florida Rock*, 18 F.3d at 1568-71. This is the difference between "mere diminution" in value and a "partial taking." *See Palm Beach Isles Associates, Inc. v.*

United States, 231 F.3d 1354, 1359 (Fed. Cir. 2000). Additionally, the "average reciprocity of advantage" rationale should not be applied to generalized public benefits. *See District Intown Properties Ltd. Partnership v. District of Columbia*, 198 F.3d 874, 890 (D.C. Cir. 1999) ("[R]esting uncompensated landmark preservation on the idea of reciprocal advantage stretches the concept into meaninglessness. ") (Williams, J., concurring).

In the decision below, the Ninth Circuit suggested that the Raisin Marketing Order "inures to the Hornes' benefit" and "conditionally grant[s] a government benefit in exchange for an exaction." *Horne II*, 750 F.3d at 1141, 1143. The panel's rationale was clearly premised on the purported regulatory "benefits" Petitioners received in exchange for title to a significant portion of their raisin crops:

> Here, we pause to consider the RAC's structure and purpose, as well as the benefits it secures for the producers such as the Hornes
>
> [T]he Hornes' equitable stake in the reserved raisins, even in years in which they are not entitled to a cash distribution from the RAC, funds the administration of an industry committee. . . In light of this scheme, the Hornes cannot claim they lose all rights associated with the reserve raisins. Indeed, the structure of the diversion program ensures the reserved raisins continue to work to the Hornes' benefit after they are diverted to the RAC, even in years in which producers

> receive no equitable distribution of the RAC's net profits.

Id. at 1141.

The Ninth Circuit's analysis removes the "economic impact" factor from its regulatory moorings and erroneously utilizes the "average reciprocity of advantage" rationale to justify a physical taking.[6] This confuses the straightforward physical takings inquiry. *See Brown v. Legal Foundation of Washington*, 538 U.S. 216, 233 (2003) ("Our jurisprudence involving condemnations and physical takings is as old as the Republic and, for the most part, involves the straightforward application of *per se* rules. Our regulatory takings jurisprudence, in contrast, is of more recent vintage and is characterized by 'essentially ad hoc, factual inquiries.'") (quoting *Penn Central*, 438 U.S. at 124). The *Penn Central* factors are simply irrelevant in a physical takings context. *See, e.g., Tahoe-Sierra*, 535 U.S. at 323 ("This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a

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[6] Indeed, the *Penn Central* factors are not even applicable to regulatory takings cases where a regulation works a complete "wipe out" of economic value, because the regulation is a *per se* taking that is functionally equivalent to a taking caused by physical destruction or eminent domain. *Lucas*, 505 U.S. at 1016-18.

claim that there has been a 'regulatory taking,' and vice versa."); *Keystone Bituminous Coal Ass'n v. De Benedictis*, 480 U.S. 470, 517 (1987) ("No one, however, would find any need to employ these analytical tools [(the *Penn Central* factors)] where the government has physically taken an identifiable segment of property." (Rehnquist, J., dissenting)); *Loretto*, 458 U.S. at 432 ("[*Penn Central*] does not repudiate the rule that a permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors. ."); *Palm Beach Isles*, 231 F.3d at 1357 ("In a physical taking context, [q]uestions of whether the owner had reasonable investment-backed expectations at the time the property was first acquired are simply not part of the analysis."); *Norman v. United States*, 63 Fed. Cl. 231, 246 (2004), *aff'd*, 429 F.3d 1081 (Fed. Cir. 2005) ("[I]n the instance of a physical occupation of private property, the ad hoc inquiry of *Penn Central* does not apply.").

To make matters worse, even if the Ninth Circuit were correct in applying a regulatory takings analysis, it did not even attempt to determine whether Petitioners' interest in reserved tonnage raisins was merely diminished or partially taken. *See Palm Beach Isles*, 231 F.3d at 1359. Doing so would have highlighted the ill fit between a regulatory takings analysis and this case, because producers' title to the reserved tonnage raisins was neither diminished nor partially taken, but completely transferred to the RAC. Moreover, the existence and operation of a

government agency – and whatever "benefits" that agency provides – is more similar to a generalized public benefit than a reciprocal benefit of regulation that inures directly to Petitioners. *See District Intown Properties*, 198 F.3d at 890; *see also Armstrong v. United States*, 364 U.S. 40, 49 (1960) ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.").

B. The Ninth Circuit Erred In Holding That An Equitable Stake In The Reserved Tonnage Raisins Prevents The Raisin Marketing Order From Effectuating A Taking.

In concluding that the Raisin Marketing Order does not effectuate a taking, the Ninth Circuit relied in part on the fact that it provides producers with an "equitable stake" in reserved tonnage raisins transferred to the RAC. *Horne II*, 750 F.3d at 1141. The panel acknowledged that this equitable distribution "may be zero" under the Raisin Marketing Act. *Horne II*, 750 F.3d at 1140. However, it determined that "the equitable distribution is not zero in every year" and, thus, Petitioners "did not lose all economically valuable use of their personal property." *Id.* at 1140.

This conclusion was in error. It is only in the regulatory takings context that loss of "all economically valuable use" is relevant.[7] *See Lucas*, 505 U.S. at 1016 (a categorical regulatory taking occurs "where regulation denies all economically beneficial or productive use of land"). In a physical takings context, the issue is whether "just compensation" has been paid. *Arkansas Game & Fish Comm'n*, 133 S. Ct. at 518. While the Ninth Circuit made sure to emphasize that no compensation was necessary here, it heavily relied on Petitioners' theoretical "equitable stake" and the regulatory "benefits" of the Raisin Marketing Order in finding that no taking occurred. *Compare Horne II*, 750 F.3d at 1141 n.16 *with id.* at 1140-41, 1141 n.17. In effect, the Ninth Circuit determined that no compensation was necessary because Petitioners received *some* benefit from the Raisin Marketing Order. *Id.* at 1140-41. This surprising conclusion opens the door for governmental entities to skirt the Takings Clause merely by providing some benefit – however *de minimis* – in return for seizure of a claimant's property. This negates the plain meaning

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[7] Furthermore, even if the Ninth Circuit were correct in applying a regulatory takings analysis, it incorrectly found that producers' retention of an equitable interest in the reserved raisins worth far less than fair market value prevented the Raisin Marketing Order from effectuating a taking. *See Florida Rock*, 45 Fed. Cl. at 41 (where claimant's only remaining right was "sale of the property for much less than its value before regulation," claimant had suffered a taking); *Yancey*, 915 F.2d at 1543 (where farmer's turkey flocks were only valuable, at a great loss, through sale; a regulatory taking occurred).

of "just" compensation. *See Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 10 (1984) ("'Just compensation,' we have held, means in most cases the fair market value of the property on the date it is appropriated.") (citing *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511-13 (1979)); *Olson v. United States*, 292 U.S. 246, 255 (1934) (the purpose of the just compensation requirement is to put the claimant "in as good a position pecuniarily as if his property had not been taken"). The Ninth Circuit erred in substituting a minor, uncertain benefit for the just compensation necessary to recompense a physical taking.

C. The Ninth Circuit Erred In Holding That A Generalized Public Benefit Prevents The Raisin Marketing Order From Effectuating A Taking.

In concluding that the Raisin Marketing Order does not effectuate a taking, the Ninth Circuit also placed significant emphasis on the *purpose* of the Raisin Marketing Order: "The Marketing Order ensures 'orderly' market conditions by regulating raisin supply [R]eserved raisins are diverted from the market to smooth the peaks of the raisin supply curve. To smooth the supply curve's valleys, reserved raisins are released when supply is low." *Horne II*, 750 F.3d at 1133 (quoting 7 U.S.C. § 602(1)) (internal citations omitted). The panel then found that, under the *Nollan/Dolan* "nexus and rough proportionality" test, the Raisin Marketing Order was sufficiently

related to the public interest and no taking had occurred. *Horne II*, 750 F.3d at 1143-44.

The panel emphasized that Petitioners benefitted from this "smoothing" of supply and demand, but did not mention that the overall purpose of the AMAA is to promote the *public's* interest in stabilized prices. *Compare id.* at 1141 *with* 7 U.S.C. § 602(2) ("It is declared to be the policy of Congress [t]o protect the interest of the consumer"). Indeed, this is how the Raisin Marketing Order operates in practice. For example, in 2003-2004, the government paid nothing to the producers for the 38.5 million pounds of raisins it took from them. *See Analysis Report* at 23. The RAC did not wait until demand was high and then return the reserved tonnage raisins to producers. Instead, the RAC sold or distributed those raisins to third parties and kept the profits for itself. 7 C.F.R. §§ 989.67(c)-(e). This is a "'classic taking' in which the government directly appropriates private property for its own use." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 522 (1998) (plurality) (quoting *United States v. Security Industrial Bank*, 459 U.S. 70, 78 (1982)).

This Court's precedent is clear that, while a public interest may *justify* a taking; just compensation must be paid: "[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Mahon*, 260 U.S. at 415-16 ("The protection of private property in the Fifth Amendment *presupposes* that it is wanted for public use, but provides that it shall not be taken

for such use without compensation.") (emphasis added); *Palazzolo v. Rhode Island*, 533 U.S. 606, 637 (2001) ("It is wrong for the government to take property, *even* for public use, without tendering just compensation.") (emphasis in original) (Scalia, J., concurring); *Loretto*, 458 U.S. at 425 (This Court accepted as true that the law at issue "serves the legitimate public purpose" but explained, "[i]t is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid.").

There is a significant difference between regulatory burdens that are shared by the public at large, such as the land use restrictions at issue in *Nollan* and *Dolan*, and the Raisin Marketing Act, which physically takes a significant portion of producers' raisins. *Cf., Nollan*, 483 U.S. at 856 ("[A]ppellants benefit both as private landowners and *as members of the public* from the fact that new development permit requests are conditioned on preservation of public access." (emphasis added)). Here, the Ninth Circuit determined that a physical taking is not compensable so long as the taking has some nexus to the public benefit it purports to advance. Such a holding eviscerates the Fifth Amendment. *See Florida Rock*, 18 F.3d at 1571 ("[To hold] that when Government acts in pursuit of an important public purpose, its actions are excused from liability would eviscerate the plain language of the Takings Clause, and would be inconsistent with Supreme Court guidance."); *see also* Andrea L. Peterson, *The Takings Clause: In Search of*

Underlying Principles Part II Takings as Intentional Deprivations of Property Without Moral Justification, 78 Cal. L. Rev. 53, 154 (1990) (noting that a "recurrent theme [in Supreme Court decisions] is that whether a taking occurred depends on what the government did to the claimant, rather than the government's justification for its action"). If the government's only burden is to demonstrate that a physical taking is "roughly proportional" to the government's stated goals and has some "nexus" to those goals, *Horne II*, 750 F.3d at 1143-44, the "necessary prerequisite to the government's exercise of its taking power" becomes a final determination that a taking has not occurred. *See Keystone Bituminous Coal Ass'n*, 480 U.S. at 511 (the existence of a "public purpose . does not resolve the question whether a taking has occurred") (Rehnquist, J., dissenting); *Kelo*, 545 U.S. at 506 (Describing the Public Use Clause as "a meaningful limit on the government's eminent domain power.") (Thomas, J., dissenting).

Because an *ad hoc* regulatory takings analysis is inapplicable in a physical takings case, the Ninth Circuit's rationalization of the Raisin Marketing Order was in error. There exists here "a straightforward taking of private property for a public use for which just compensation must be paid." *Preseault v. United States*, 100 F.3d 1525, 1551 (Fed. Cir. 1996). The decision below sets a dangerous precedent for future physical takings cases, and must not be allowed to stand.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition.

Respectfully submitted,

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Supreme Court, U.S.
FILED
OCT - 8 2014
OFFICE OF THE CLERK

No. 14-275

In the
Supreme Court of the United States

MARVIN D. HORNE, et al.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the government's "categorical duty" under the Fifth Amendment to pay just compensation when it "physically takes possession of an interest in property," *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012), applies only to real property and not to personal property.

2. Whether the government may avoid the categorical duty to pay just compensation for a physical taking of property by reserving to the property owner a contingent interest in a portion of the value of the property, set at the government's discretion.

3. Whether a governmental mandate to relinquish specific, identifiable property as a "condition" on permission to engage in commerce effects a per se taking.

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INTEREST OF AMICUS CURIAE

Pursuant to Rule 37.2(a), Pacific Legal Foundation (PLF) respectfully files this amicus curiae brief in support of Petitioners Marvin D. Horne, et al.[1]

Founded in 1973, PLF is the nation's most experienced public interest legal organization defending Americans' property rights. PLF attorneys have participated as lead counsel or amicus curiae in several important cases in this Court in defense of the right of individuals to make reasonable use of their property, and to seek and obtain redress when that right is infringed. *See, e.g., Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511 (2012); *Sackett v. EPA*, 132 S. Ct. 1367 (2012); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997). PLF attorneys also served as lead counsel in the landmark case, *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), defining the scope of government's authority to impose exactions on land use permits under the Takings Clause, and in the more recent case, *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013), affirming that the Takings Clause protects money, as well as real property, in land use permitting transactions.

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[1] All parties have been given timely notice of PLF's intent to participate in this case as amicus curiae, and all parties have consented to the filing of this brief. Letters of consent have been filed with the Clerk of the Court. PLF affirms under Rule 37.6 that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than PLF, its members, or its counsel made a monetary contribution to its preparation or submission.

Because of its experience and familiarity with these issues, PLF believes that its brief will assist the Court in considering the Petition for Writ of Certiorari in this case.

SUMMARY OF REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision in this case severely undermines this Court's takings jurisprudence and threatens to discredit important principles of property law that enforce property owners' constitutional right not to have property taken without just compensation. One of those principles is the application of a straightforward, per se rule to government action that directly appropriates private property. *Ark. Game & Fish Comm'n*, 133 S. Ct. at 518 ("[W]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner.") (quoting *Tahoe Sierra Preservation Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002)). The decision below ignores that rule by failing to apply a per se test to the raisin marketing order appropriating the Hornes' raisins. It does so by impermissibly narrowing the concept of a "physical taking" to exclude personal—as opposed to real—property. There is no legal basis for such a distinction. To the contrary, this Court has long applied a per se analysis to the appropriation of personal property. *See, e.g., Kimball Laundry Co. v. United States*, 338 U.S. 1, 3-4 (1949) (applying a per se analysis to seizure of a business); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) (applying a per se analysis to interest on a bank account); *Koontz*, 133 S. Ct. 2586 (finding government's

demand for money indistinguishable from demands for real property).

The decision below also creates a conflict by construing the raisin marketing order as a mere "use restriction," subject to this Court's permit exaction takings standards in *Nollan*, 483 U.S. 825, and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). *Contra Nollan*, 483 U.S. at 831 (criticizing dissenting opinion's description of easement dedication requirement as a "mere restriction" on property use as opposed to a physical taking). Under that reasoning, any physical appropriation of private property could be recast as a mere "restriction on use," thus eviscerating the per se takings standards which this Court and other federal circuits have long endorsed. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421, 426 (1982) (finding small physical invasion of private property a per se taking); *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 235 (2003) (applying a per se analysis in challenge to state's appropriation of interest on lawyers' trust accounts and describing that interest as "private property"); *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1291-96 (Fed. Cir. 2008) (applying a per se, physical takings analysis to government diversion of water).

Finally, the decision below creates a conflict by undermining the *Nollan* and *Dolan* standards themselves. It relegates them to little more than a means-ends analysis of the kind which this Court specifically disavowed as having any role in takings jurisprudence. *See Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 542 (2005) ("A means-ends test . . . is not a valid method of discerning whether private property

has been 'taken' for purposes of the Fifth Amendment.").

This Court should grant the Petition for Writ of Certiorari to resolve these conflicts.

REASONS FOR GRANTING THE PETITION

I

THE DECISION BELOW IS IN SEVERE CONFLICT WITH THIS COURT'S AND OTHER CIRCUITS' TAKINGS JURISPRUDENCE APPLYING A PHYSICAL TAKINGS ANALYSIS TO GOVERNMENT APPROPRIATION OF PRIVATE PROPERTY

A. A Per Se Physical Takings Rule Applies to the Raisin Marking Order

When government appropriates private property, it effectuates a physical taking and must pay just compensation to the owner. U.S. Const. amend. V; *Brown*, 538 U.S. at 233 ("When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner.") (quoting *United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951)). The rule applies broadly, regardless of how the property is appropriated. *See, e.g., Kimball Laundry*, 338 U.S. at 3-4 (seizure of laundry business during World War II constituted a per se taking); *Loretto*, 458 U.S. at 426 (state statute requiring landlords to allow installation of cable equipment on buildings caused a per se physical taking). And it applies even where the appropriation is neither total nor permanent. *See*

United States v. Causby, 328 U.S. 256, 265-68 (1946) (finding government liable for a taking where airplane overflights interfered with property owner's chicken farm); *Ark. Game & Fish*, 133 S. Ct. at 522 (finding government-induced flooding, although temporary in duration, is not exempt from the Takings Clause).

By carving out an exception to the per se rule for physical appropriations of personal property, the Ninth Circuit created a conflict with this Court's holdings, which have never sanctioned a constitutional distinction between real and personal property. In *United States v. General Motors Corp.*, 323 U.S. 373, 377-78 (1945), for example, this Court analyzed the Fifth Amendment's Takings Clause as encompassing the group of rights that a citizen possesses in regard to a "physical thing." *See also Loretto*, 458 U.S. at 435 ("Property rights in a physical thing have been described as the rights 'to possess, use and dispose of it.'") (*quoting Gen. Motors Corp.*, 323 U.S. at 378). It then went on to find that the government's takings liability encompassed not only real property, but also "fixtures and permanent equipment destroyed or depreciated in value by the taking . [because] [a]n owner's rights in these are no less property within the meaning of the Fifth Amendment than his rights in the land and structures thereon erected." *Gen. Motors Corp.*, 323 U.S. at 383-84.[2] Similarly in *Webb's*, this Court unanimously held that a County's appropriation of interest accruing on an interpleader fund constituted a taking. 449 U.S. at 163-64 The *Webb's* Court was not troubled by the distinction between real and personal property, but it did find relevant the

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[2] The Court's holding explicitly covered both fixtures and trade fixtures.

difference between a mere deprivation of use and a "forced contribution to general governmental revenues." *Id.* at 163. While the former are analyzed under the ad hoc balancing test of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978), the latter constitute per se takings because "a State, by *ipse dixit*, may not transform private property into public property without just compensation." *Webb's*, 449 U.S. at 164.

Cases involving water rights are also instructive. In *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 752-55 (1950), this Court held that the Government committed a taking when it diverted water in such a way that left the claimants' lands without water, even though the claimants held valid riparian rights. Similarly, the Court found a taking where the Government appropriated the right of private water districts to collect water from a river, and where it allowed a power plant to draw the entirety of a river's flow, to the detriment of individual water rights holders. *Dugan v. Rank*, 372 U.S. 609, 620-21 (1963); *Int'l Paper Co. v. United States*, 282 U.S. 399, 404-08 (1931). In *Gerlach*, *Dugan*, and *International Paper*, "the Supreme Court analyzed the government action as a *per se taking*" even though no real property had been taken. *Casitas*, 543 F.3d at 1290 (emphasis added); *see id.* at 1294 (finding government-mandated water diversion "no less a physical appropriation" than the government's seizure of coal mines in World War II).

The Ninth Circuit's decision is likewise at odds with other circuits. In *Nixon v. United States*, 978 F.2d 1269, 1284 (D.C. Cir. 1992), the District of Columbia Circuit categorically rejected the Government's

argument that a per se taking may only occur with respect to real property. It correctly held that "the Government's inference that the per se doctrine must be limited to real property is without basis in the law" because "[o]ne may be just as permanently and completely dispossessed of personal property as of real property." *Id.* at 1285. Thus, Richard Nixon's presidential papers could not be taken into Government possession without just compensation. The same has been said in other circuits with respect to interest in a bank account, *Cerajeski v. Zoeller*, 735 F.3d 577, 580 (7th Cir. 2013), surplus political contributions, *Anderson v. Spear*, 356 F.3d 651, 669-70 (6th Cir. 2004), Lee Harvey Oswald's possessions, *Porter v. United States*, 473 F.2d 1329, 1335 (5th Cir. 1973) and fish, *United States v. Corbin*, 423 F.2d 821, 828-29 (10th Cir. 1970).

Because the marketing order requires the Hornes to transfer a percentage of their raisin crop to the government, this Court and at least five other circuits would recognize it as a per se taking. This Court should grant the Writ of Certiorari to overturn the Ninth Circuit's contrary ruling and reaffirm that the direct physical appropriation of private property is subject to a per se takings analysis.

B. The Ninth Circuit's Application of This Court's Land Use Exaction Jurisprudence to the Raisin Marking Order Has No Basis in Law

Because a physical takings analysis applies, this Court's permit exaction jurisprudence in *Nollan* and *Dolan* is irrelevant to evaluating the constitutionality of the raisin marketing order. Those cases "'involve[d] a special application' of [the unconstitutional conditions] doctrine that protects the Fifth Amendment right to just compensation for property the government takes *when owners apply for land-use permits.*" *Koontz*, 133 S. Ct. at 2594 (quoting *Lingle*, 544 U.S. at 547) (emphasis added).

In *Nollan*, coastal property owners Patrick and Marilyn Nollan challenged a requirement that they dedicate an easement across their beach front yard to the public, as a condition of obtaining a permit to build a house. 483 U.S. at 828. This Court struck down that condition as unconstitutional because there was no close connection, or "essential nexus" between the condition itself, and any negative impacts caused by the Nollan's house. *Id.* at 837-39. As a result, the purpose of the easement condition was "quite simply, the obtaining of an easement without payment of just compensation," which was "not a valid regulation of land use but an out-and-out plan of extortion." *Id.* at 837 (internal quotation marks omitted).

In *Dolan*, this Court considered permit conditions imposing easements for a storm drainage system and public pathway on business owner Florence Dolan's property as a condition of her expanding her plumbing and electrical supply store. 512 U.S. at 379-80.

Although the conditions satisfied *Nollan*'s "essential nexus" requirement—because the enlarged store would cause increased flooding and traffic which the easements would assuage—that connection alone was insufficient to justify the conditions. *Id.* at 391. This Court held that the Fifth Amendment also required the City to demonstrate "rough proportionality" between the required dedication and the impact of the proposed development by making an individualized assessment. *Id.* The City's conditions failed constitutional muster for lack of such an assessment. Together, *Nollan* and *Dolan* "allow[] the government to condition approval of a permit on the dedication of property to the public so long as there is a 'nexus' and 'rough proportionality' between the property that the government demands and the social costs of the applicant's proposal." *Koontz*, 133 S. Ct. at 2595.

Here, the Ninth Circuit applied the *Nollan/Dolan* rule to this case because it believed the rule "serves to govern this use restriction as well as it does the land use permitting process." *Horne v. U.S. Dept. of Agriculture*, 750 F.3d 1128, 1142 (9th Cir. 2014). But that is an inapt characterization of the raisin marketing order. The order does not restrict the Hornes' use of their raisins; it requires them to give their raisins to the government. And the *Nollan* Court specifically rejected the argument that a requirement to dedicate property to the government could be characterized as a "mere restriction on its use." 483 U.S. at 831 (rejecting Justice Brennan's description of the easement condition as a use restriction).

Perhaps most troubling, under the Ninth Circuit's reasoning, *any* requirement that people dedicate property to the government could be recast as a mere

restriction on the use of that property. Taken to its logical conclusion, that reasoning would foreclose any use of per se takings analysis in Fifth Amendment jurisprudence. Under *Loretto*, for example, any "permanent physical occupation" of property is a per se taking. 458 U.S. at 426. But why could not such a "permanent physical occupation" simply be re-characterized as a restriction on the right to use one's property? Under the Ninth Circuit's rationale, it could, and would. *Contra id.* at 439 (rejecting argument that "the law is simply a permissible regulation of the use of real property"). Similarly, the rule affirmed in *Casitas*, that government-mandated diversion of water is subject to a per se analysis, could be recast as a use restriction. Under the Ninth Circuit's rationale, the use of one's water right could be said simply to be exercised subject to government restrictions on its use. *Contra Casitas*, 543 F.3d at 1294 (rejecting the government's argument that the water diversion was a use restriction because "this case involves physical appropriation by the government"). Drawing a line around physical appropriations of private property, and affirming that such appropriations are always subject to a per se analysis as this Court and other circuits have done, is inconsistent with the Ninth Circuit's analysis. *See, e.g., Brown*, 538 U.S. at 233 (The "plain language [of the Fifth Amendment] requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a *physical appropriation*.") (emphasis added) (quoting *Palazzolo*, 533 U.S. at 636 (O'Connor, J., concurring)).

II

THE DECISION BELOW CONFLICTS WITH THIS COURT'S PERMIT EXACTION JURISPRUDENCE

A. The Ninth Circuit's Description and Application of *Nollan* and *Dolan* Conflict with This Court's Precedent

The Ninth Circuit's decision conflicts with this Court's takings jurisprudence for another reason which threatens to set a dangerous precedent if left undisturbed: it relegates those standards to little more than a means-ends analysis of the kind this Court has rejected for takings claims. *See Lingle*, 544 U.S. at 542. Throughout its decision, the Ninth Circuit repeatedly describes *Nollan* and *Dolan* as requiring nothing more than a connection between the means and the ends of the challenged marketing order. *See, e.g.*, *Horne*, 750 F.3d at 1143 ("We now turn to the nexus requirement and ask if the reserve program 'further[s] the end advanced as its justification.'") (quoting *Nollan*, 483 U.S. at 837); *id.* at 1144 ("There is a sufficient nexus between the means and the ends of the Marketing Order. The structure of the reserve requirement is at least roughly proportional (and likely actually proportional) to Congress's stated goal of ensuring an orderly domestic raising market."). In other words, under the Ninth Circuit's approach, so long as the exaction (the requirement to dedicate raisins) furthers the government's purpose in imposing the exaction (having an "orderly domestic raisin market"), *Nollan* and *Dolan* are satisfied.

But that analysis—at least on its face—seems to ignore the important role that *impacts* from private

uses of property play in triggering a *Nollan/Dolan* analysis in the first place. As this Court recently explained in *Koontz*, the *Nollan* and *Dolan* tests are premised on the idea that government may "condition approval of a permit on the dedication of property to the public so long as there is a 'nexus' and 'rough proportionality' between the property that the government demands *and the social costs of the applicant's proposal.*" 133 S. Ct. at 2595 (emphasis added). Those "social costs" are what authorize the lawful demand for an exaction of property as a condition of obtaining a permit in the first place. After all, the easement condition in *Nollan* was struck down because the Commission failed to show the easement would "remedy any additional congestion on [the beach] *caused by* construction of the Nollans' new house." 483 U.S. at 838-39 (emphasis added); *see also Pennell v. City of San Jose*, 485 U.S. 1, 20 (1988) (Scalia, J., concurring in part and dissenting in part) (traditional land use regulation is valid because there exists "a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy").

Many authorities have long recognized causation as the essence of the *Nollan/Dolan* analysis. *See* Timothy M. Mulvaney, *Proposed Exactions*, 26 J. Land Use & Envtl. L. 277, 281 (2011) (In *Nollan*, "the state did not meet its burden of proving that a condition requiring a beach access pathway bore an 'essential nexus' *to the impacts caused by the development.*") (emphasis added); Pierson Andrews, Nollan *and* Dolan: *Providing a Roadmap for Adopting a Uniform System to Determine Transportation Impact Fees*, 25 BYU J. Pub. L. 143, 146 (2011) ("In *Nollan*, the United States

Supreme Court concentrated on the connection between the exaction required by the government and *the burden imposed by the new development*.") (emphasis added); J. David Breemer, *The Evolution of the "Essential Nexus": How State and Federal Courts Have Applied* Nollan *and* Dolan *and Where They Should Go from Here*, 59 Wash. & Lee L. Rev. 373, 378 (2002) ("*Nollan* established that an 'essential nexus' must exist between a development condition and the amelioration of a legitimate public problem *arising from the development*.") (emphasis added); James E. Holloway & Donald C. Guy, *Land Dedication Conditions and Beyond the Essential Nexus: Determining "Reasonably Related" Impacts of Real Estate Development Under the Takings Clause*, 27 Tex. Tech L. Rev. 73, 96 (1996) ("*Nollan*'s essential nexus test requires the government to establish a more direct, causal connection between land dedication conditions and the impact of real estate development on infrastructure and public facilities."); Brian T. Hodges & Daniel A. Himebaugh, *Have Washington Courts Lost Essential Nexus to the Precautionary Principle?* Citizens' Alliance for Property Rights v. Sims, 40 Envtl. L. 829, 829 (2010) ("The essential nexus test requires the government to establish a *cause-and-effect* connection between development and an identified public problem before placing conditions on development.") (emphasis added).

Here, the Ninth Circuit applied *Nollan / Dolan* not by looking to see if the federal government had demonstrated causation or rough proportionality between the Hornes' sale of their raisins on the open market and the alleged market volatility, but by *assuming* that the marketing order scheme works.

Horne, 750 F.3d at 1143 ("By reserving a dynamic percentage of raisins annually such that the domestic raisin supply remains relatively constant, the Marketing Order program furthers the end advanced: obtaining orderly market conditions."). Under *Nollan* and *Dolan*, such an assumption is not sufficient. *See, e.g., Dolan*, 512 U.S. at 395 (striking permit conditions for the City's failure to meet "its burden" of demonstrating rough proportionality between the conditions and the impacts of development); *id.* at 396 (Stevens, J., dissenting) (arguing that "[t]he Court has made a serious error by abandoning the traditional presumption of constitutionality and imposing a novel burden of proof on a city . . .").

It is difficult to see how the Ninth Circuit's consideration of the marketing order differs from the "substantially advances" inquiry which this Court specifically disavowed as a takings test in *Lingle*. There, Chevron challenged a Hawaii regulation restricting the amount of rent it could charge its service station lessees as a taking. 544 U.S. at 533-34. It alleged that the regulation failed to "substantially advance a legitimate state interest" and therefore failed this Court's takings test as articulated in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). *Lingle*, 544 U.S. at 534. Because the lower court found that the law would not achieve that purpose, it struck it down as a taking under the "substantially advances" standard. *Id.* at 535-36. In doing so, the trial court considered competing expert testimony about the effectiveness of the law, and whether it would actually further the Hawaiian Legislature's purpose of protecting independent gasoline dealers from the

effects of market concentration. *Id.* The Ninth Circuit affirmed. *Id.* at 536.

On appeal, this Court reversed because it found that the *Agins* "substantially advances" test was not an appropriate takings test. *Id.* at 540. Rather, that test "prescribes an inquiry in the nature of due process." *Id.* In reaching that conclusion, the *Lingle* Court rejected the Ninth Circuit's "means-ends" analysis as having any role in defining unconstitutional takings. The Court stated:

> The "substantially advances" formula suggests a means-ends test: It asks, in essence, whether a regulation of private property is *effective* in achieving some legitimate public purpose. An inquiry of this nature has some logic in the context of a due process challenge . . But such a test is not a valid method of discerning whether private property has been "taken" for purposes of the Fifth Amendment.

Id. at 542.

Here, by focusing on the means-ends connection between the raisin marketing order and the government's goal of creating stable market conditions, the Ninth Circuit diluted *Nollan* and *Dolan* to a means-ends analysis of the kind rejected in *Lingle*. Because that standard does not squarely place the burden on government to demonstrate a close connection between an exaction appropriating private property, and the need to mitigate harmful impacts of a property owner's use of that property, the court's analysis fails the *Nollan/Dolan* standard.

This Court should grant certiorari to overturn the Ninth Circuit's decision because it undermines the *Nollan/Dolan* test as a robust check on government appropriations of private property, thereby conflicting with this Court's precedent.

CONCLUSION

The Ninth Circuit's decision conflicts with and undermines this Court's and other Circuit's takings jurisprudence, to the great detriment of property owners, thus raising important issues of federal law. For these reasons, this Court should grant the Petition for Writ of Certiorari.

DATED: October, 2014.

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Supreme Court, U.S.
FILED
OCT 7 - 2014
OFFICE OF THE CLERK

No. 14-275

In the Supreme Court of the United States

MARVIN D. HORNE, ET AL.,
Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE STATE OF TEXAS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

Texas and its citizens have a significant interest in this case, as they did when these parties first came before the Court.[1] Marketing orders promulgated under the Agricultural Marketing Agreement Act of 1937 (AMAA) govern the production of fruits and vegetables grown on a large scale in Texas. *See* 7 C.F.R. § 906 (oranges and grapefruit grown in lower Rio Grande valley); 7 C.F.R. § 959 (South Texas onions). And Texas ranks among the top producers of other crops subject to proposed marketing agreements under the AMAA. Any agricultural product within the scope of the AMAA is potentially subject to appropriation through a marketing order similar to the Raisin Marketing Order in this case. Though that order's reserve requirement does not feature in all AMAA marketing orders, it is not unique to raisins. *See, e.g.*, 7 C.F.R. § 981.52 (almonds); 7 C.F.R. § 993.57 (prunes). Because Texas citizens currently operate under AMAA marketing orders, and because additional marketing orders may issue, Texas has a substantial interest in the questions presented.

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[1] *See* Brief of the State of Texas as Amicus Curiae In Support of Petitioners, *Horne* v. *Dep't of Agric.*, 133 S. Ct. 2053 (2013) (No. 12-123).

SUMMARY OF ARGUMENT

Agriculture plays a central role in the Texas economy. Texas crops are currently subject to marketing orders promulgated under the AMAA, and are potentially subject to future orders. The Ninth Circuit's holding will substantially affect Texas and other agricultural States.

The decision below has introduced confusion that extends beyond the agricultural interests at stake here. As the Petitioners explain, the Ninth Circuit departed from the holdings of this Court and several other circuits in multiple facets of takings jurisprudence. Courts and litigants alike need clarity in this often-litigated area of the law. The Court should grant certiorari.

ARGUMENT

I. MARKETING ORDERS LIKE THE ONE AT ISSUE HERE AFFECT TEXAS AGRICULTURAL INTERESTS.

Since its inception as a republic—and, indeed, long before—Texas has been defined, both culturally and economically, by its agriculture industry. *See, e.g.*, Wm. B. Bizzell, Rural Texas 99 (L. H. Bailey ed., 1924) ("Agriculture in Texas antedated the beginning of recorded history."); Henry C. Dethloff & Garry L. Nall, *Agriculture*, *in* 1 The New Handbook of Texas 60, 60 (Ron Tyler et al. eds., 1996) ("Modern Texas agriculture evolved from the agriculture of prehistoric Texans . . . ."); Henderson K. Yoakum, 1 History of Texas from Its First Settlement in 1685 to Its Annexation to the United States in 1846 6 (1856) ("[T]here is no country of like extent where a greater

variety and quality of agricultural productions can be raised; nor is there any country where the laborer can find a more certain reward for his toil."). Today, agriculture represents an over $25 billion industry in Texas. John Robinson & Caroline Gleaton, *Agriculture in Texas*, *in* Texas Almanac 2014-2015 682, 682 (Elizabeth C. Alvarez ed., 2014). One in seven working Texans is employed in the agriculture industry. *See Texas Ag Stats*, Texas Department of Agriculture, http://bit.ly/1nctGZQ (last visited Oct. 6, 2014).

Texas agriculture is important not only to the State, but also to the national economy. As of 2012, Texas ranked first in the nation in exports of cotton and beef; top five in exports of tree nuts, rice, and planting seeds; top ten in milk, wheat, and grain products; and top fifteen in fresh fruits, fresh vegetables, corn, and sugar. *Texas Ag Stats*, *supra*. This places Texas sixth in the nation in overall value of agricultural exports. *Id.* USDA regulation of agricultural industries thus significantly impacts Texas.

To carry out its policy to "establish and maintain such orderly marketing conditions for any agricultural commodity enumerated in [7 U.S.C.] section 608c(2)," and to "provide, in the interests of producers and consumers, an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices," 7 U.S.C. § 602(4), Congress has authorized the Secretary of Agriculture to "remove from the normal channels of trade and commerce quantities of any basic agricultural commodity or product thereof," *id.* § 608(3)(a). Several

of the "agricultural commodities enumerated in section 608c(2)" are produced on a large scale on Texas farms and ranches,[2] and are subject to the same sort of appropriation the Secretary has exercised against raisin producers.

As noted above, the Secretary has already subjected to marketing orders Texas oranges and grapefruits grown in the lower Rio Grande Valley and onions grown in South Texas.[3] 7 C.F.R. §§ 906, 959. While those orders do not currently require producers to surrender title to their crops as the Raisin Marketing Order does, nothing prevents the Secretary from subjecting these or any other Texas crop listed above to a similar order in the future.

The livelihoods of more than one million working Texans and their families are tied to its agricultural industry. *See Texas Ag Stats*, *supra*. The interpretation of the Secretary's authority under the AMAA, and the takings-clause restraints on that authority, will affect more than one million Texas residents, not to mention millions of other farming families across the nation. The

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[2] These include dairy products, onions, pecans, potatoes, grapefruit, cabbage, watermelons, cucumbers, cantaloupes, squash, peppers, peaches, oranges, carrots, dry beans, tomatoes, grapes, sweet potatoes, and spinach. *Agriculture in Texas*, *supra*, at 683.

[3] The Secretary has considered extending marketing orders to other crops grown in Texas. *See, e.g.*, Proposed National Marketing Agreement Regulating Leafy Green Vegetables, 76 Fed. Reg. 24292, 24307 (Apr. 29, 2011) (including Texas in list of "anchor States that produce the majority of leafy green vegetables in the United States").

issues raised are of deep concern to Texas and merit the Court's attention.

II. THE COURT SHOULD GRANT CERTIORARI TO CLARIFY THIS IMPORTANT AREA OF THE LAW.

As a sovereign, Texas exercises condemnation authority, subject to the Constitution's public-use requirement and the requirement to provide just compensation for any property taken. U.S. Const. amends. V and XIV. The Texas Constitution imposes a similar limitation. *See* Tex. Const. art. I, § 17. Texas and its political subdivisions use the condemnation power to expand highways,[4] manage flood-control efforts,[5] provide park and recreation facilities,[6] and preserve historical sites.[7] And because disputes often arise over how much compensation is "just," Texas frequently finds itself litigating this issue.

Texas courts and litigants look to federal jurisprudence when resolving disputes under the state and federal takings clauses. *See, e.g.*, *Sheffield Dev. Co.* v. *City of Glenn Heights*, 140 S.W.3d 660, 669 & n.38 (Tex. 2004) (collecting cases). As the Petitioners observe, the decision below muddies the waters in this area, creating splits in multiple facets of takings jurisprudence, including whether personal property can be subject to the per se takings rule, whether

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[4] Tex. Transp. Code § 224.001.

[5] Tex. Loc. Gov't Code § 561.001.

[6] Tex. Parks & Wildlife Code § 13.305(a).

[7] Tex. Gov't Code § 2166.055.

regulatory-takings cases can inform physical-takings cases (and vice versa), and whether the just compensation requirement applies when a property owner retains some kind of interest or benefit. Pet. 16-20, 25-29.

Certainty in this area of the law is paramount, not only for Texas courts (and those of every other State), but also for its citizens and corporations, who order their affairs around their expectations of the rights they hold in their property. The decision below has introduced uncertainty to an area of law that extends well beyond agricultural interests. It sows confusion for both property owners and condemnors. The Court should grant certiorari to prevent any further mischief that may derive from the decision below.

CONCLUSION

The Court should grant certiorari.

Respectfully submitted.

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October 2014

Supreme Court, U.S.
FILED
MAR 2 - 2015
OFFICE OF THE CLERK

No. 14-275

IN THE

Supreme Court of the United States

MARVIN D. HORNE, *et al.*,

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UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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Petition for Writ of Certiorari Filed September 8, 2014
Certiorari Granted January 16, 2015

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UNITED STATES OF AMERICA
DEPARTMENT OF AGRICULTURE

I, Edward T. Schafer, Secretary of the United States Department of Agriculture, do hereby certify that the annexed copy, or each of the specified number of annexed copies, is a true, correct and compared copy of a document in my official custody as hereinafter described:

In re: Marvin D. Horne and Laura R. Horne, d/b/a Raisin Valley Farms, et al.

Respondents

AMAA Docket No. 04-0002

Date	No.	PROCEEDINGS
04/01/2004	1	Complaint filed April 1, 2004 by AJ Yates, Administrator of Agricultural Marketing Service
04/14/2004	3	Respondents' Answer and Response to the Complaint filed April 14, 2004, by Marvin D. Horne and Laura Horne, Respondents
04/19/2004	5	Respondents' Motion to Dismiss filed April 19, 2004, by Marvin D. Horne and Laura Horne, Respondents

Date	No.	PROCEEDINGS
04/22/2004	6	Complainant's Opposition to Respondents' Motion to Dismiss filed April 22, 2004, by Frank Martin, Attorney for Complainant
10/07/2004	18	Motion for Discovery and Summary Judgment with Prejudice in favor of Respondents (FAX) filed October 7, 2004, by Marvin Horne and Laura Horne, Respondents
10/13/2004	20	Complainant's Opposition to Respondents' Motion for Discovery and Summary Judgment filed October 13, 2004, by Frank Martin, Attorney for Complainant
10/25/2004	24	Order Denying Discovery and Motion for Summary Judgment filed October 25, 2004, by Victor W. Palmer, Administrative Law Judge
10/25/2004	27	Amended Complaint filed October 25, 2004, by Frank Martin, Attorney for Complainant
11/15/2004	32	Answer to Amended Complaint filed November 15, 2004, by Marvin Horne and Laura Horne, Respondents

Date	No.	PROCEEDINGS
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01/31/2005	46	Respondents' Second Amended Answer (FAX) filed January 31, 2005, by David Domina, Attorney for Respondents
03/04/2005	147	Transcript of Hearing held February 8, 2005, in Fresno, California Before: Honorable Victor W. Palmer, Administrative Law Judge, filed March 4, 2005. Transcripts pages: 1 through 7
03/04/2005	148	Transcript of Hearing held February 9, 2005, in Fresno, California Before: Honorable Victor W. Palmer, Administrative Law Judge, filed March 4, 2005. Transcripts pages: 8 through 402
03/04/2005	149	Transcript of Hearing held February 10, 2005, in Fresno, California Before: Honorable Victor W. Palmer, Administrative Law Judge, filed March 4, 2005. Transcripts pages: 403 through 863

Date	No.	PROCEEDINGS
03/04/2005	150	Transcript of Hearing held February 11, 2005, in Fresno, California Before: Honorable Victor W. Palmer, Administrative Law Judge, filed March 4, 2005. Transcripts pages: 864 through 1017
04/14/2005	50	Complainant's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof filed April 14, 2005, by Frank Martin, Attorney for Complainant
05/17/2005	52	Respondent's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support filed May 17, 2005, by David Domina, Attorney for Respondents
06/17/2005	55	Complainant's Reply Brief filed June 17, 2005, by Frank Martin, Attorney for Complainant
08/03/2005	57	Order Authorizing Amendment of Complaint to Conform to the Evidence filed August 3, 2005, by Victor W. Palmer, Administrative Law Judge

Date	No.	PROCEEDINGS
08/10/2005	58	Second Amended Complaint filed August 10, 2005, by Lloyd C. Day, Administrator for Agricultural Marketing Service
08/30/2005	63	Answer to Second Amended Complaint (FAX) filed August 30, 2005, by Don Durbahn, General Partner of Lassen Vineyards
08/30/2005	65	Answer to Second Amended Complaint (FAX) filed August 30, 2005, by Don Durbahn
08/31/2005	61	Answer to Second Amended Complaint (FAX) filed August 31, 2005, by Don Durbahn, Executor of Estate of Rena Durbahn
08/31/2005	67	Respondents Marvin Horne and Laura Horne d/b/a Raisin Valley Farms' Answer to Second Amended Complaint (FAX) filed August 31, 2005, by David Domina, Attorney for Respondents
09/06/2005	69	Answer to Second Amended Complaint filed September 6, 2005, by Don Durbahn, Executor of Estate of Rena Durbahn

Date	No.	PROCEEDINGS
09/06/2005	70	Answer to Second Amended Complaint filed September 6, 2005, by Don Durbahn, General Partner of Lassen Vineyards
09/06/2005	71	Answer to Second Amended Complaint filed September 6, 2005, by Don Durbahn
09/07/2005	72	Respondents Marvin Horne and Laura Horne d/b/a Raisin Valley Farms' Answer to Second Amended Complaint filed September 7, 2005, by David Domina, Attorney for Respondents
05/23/2006	151	Transcript of Hearing held May 23, 2006, in Fresno, California Before: Honorable Victor W. Palmer, Administrative Law Judge, filed March 4, 2005. Transcripts pages: 1 through 262
12/08/2006	120	Decision and Order filed December 8, 2006, by Victor Palmer, Administrative Law Judge

Date	No.	PROCEEDINGS
01/04/2007	122	Respondent's Opening Brief On Appeal to Judicial Officer, USDA filed January 4, 2007, by David Domina, Attorney for Respondents
01/04/2007	123	Respondent's Notice of Appeal, Request for Oral Argument, and Appeal Petition to USDA Judicial Officer filed January 4, 2007, by David Domina, Attorney for Respondents
02/15/2007	127	Complainant's Brief in Opposition to Respondents' Appeal of the ALJ's decision and Order filed February 15, 2007, by Frank Martin, Attorney for Respondents
03/27/2007	129	Respondent's Reply Brief on Appeal to Judicial Officer, USDA filed March 27, 2007, by David Domina, Attorney for Respondents
04/11/2008	132	Decision and Order filed April 11, 2008, by William G. Jenson, Judicial Officer
05/12/2008	137	Complainant's Petition to Reconsider the Decision and Order of the Judicial Officer filed May 12, 2008, by Frank Martin, Attorney for Complainants

Date	No.	PROCEEDINGS
06/03/2008	139	Respondents' Opposition to Plaintiff's Petition to Reconsider filed June 3, 2008, by David Domina, Attorney for Respondents
06/19/2008	141	Order Seeking Clarification filed June 19, 2008, by William G. Jenson, Judicial Officer
07/11/2008	142	Administrator's Response to the Judicial Officer's Order Seeking Clarification filed July 11, 2008, by Frank Martin, Attorney for Complainant
08/04/2008	143	Respondents' Submission Opposing the Administrator's Response to an Order Seeking Clarification filed August 4, 2008, by David Domina, Attorney for Respondents
09/18/2008	145	Order Granting Petition to Reconsider filed September 18, 2008, by William G. Jenson, Judicial Officer

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
Live System (Fresno)

CIVIL DOCKET FOR CASE #: 1:08-cv-01549-LJL-SMS

Horne, et al v. United States Department of Agriculture	Date Filed: 10/14/2008
Assigned to: District Judge Lawrence J. O'Neill	Date Terminated: 12/11/2009
Referred to: Magistrate Judge Sandra M. Snyder	Jury Demand: None
Case in other court: 9th Circuit Court, 10-15270	Nature of Suit: 891 Agriculture Acts
Cause: 18:4208(B) Agency Action Review	Jurisdiction: U.S. Government Defendant

Date	No.	PROCEEDINGS
10/14/2008	2	COMPLAINT FOR DECLARATORY RELIEF; REVIEW OF AGENCY ACTION against United States Department of Agriculture by Marvin D. Horne, Laura R. Horne, Raisin Valley Farms, Raisin Valley Farms Marketing Association, Don Durbahn, Estate of Rena Durbahn, Lassen Vineyards. Attorney Leighton, Brian C added. (Attachments: # 1 Exhibit JO's Decision and Order of 91808)(Leighton, Brian) (Entered: 10/14/2008)

Date	No.	PROCEEDINGS
12/18/2008	8	DEFENDANT UNITED STATES DEPARTMENT OF AGRICULTURE'S ANSWER to COMPLAINT FOR DECLARATORY RELIEF; REVIEW OF AGENCY ACTION/BILL OF EQUITY; REVIEW OF USDA'S DECISION UNDER THE AGRICULTURAL MARKETING AGREEMENT ACT by United States Department of Agriculture. Attorney Hall, Benjamin E. added.(Hall, Benjamin) (Entered: 12/18/2008)
08/28/2009	24	MOTION for SUMMARY JUDGMENT by Marvin D. Horne, Laura R. Horne, Raisin Valley Farms Marketing Association, Don Durbahn, Estate of Rena Durbahn, Lassen Vineyards, LLC. Motion Hearing set for 12/4/2009 at 01:30 PM in Courtroom 4(LJO) before District Judge Lawrence J. O'Neill. (Leighton, Brian) (Entered: 08/28/2009)

Date	No.	PROCEEDINGS
08/28/2009	25	MEMORANDUM by Marvin D. Horne, Laura R. Horne, Raisin Valley Farms Marketing Association, Don Durbahn, Estate of Rena Durbahn, Lassen Vineyards, LLC in SUPPORT of 24 MOTION for SUMMARY JUDGMENT. (Leighton, Brian) (Entered: 08/28/2009)
10/06/2009	26	MOTION for SUMMARY JUDGMENT by United States Department of Agriculture. Motion Hearing set for 12/4/2009 at 01:30 PM in Courtroom 4 (LJO) before District Judge Lawrence J. O'Neill. (Attachments: # 1 Memorandum of Points and Authorities in Support of USDA's Cross-Motion for Summary and in Opposition to Plaintiffs' Motion for Summary Judgment, # 2 Statement of Undisputed Facts in Support of Cross-Motion for Summary Judgment, # 3 Response to Plaintiffs' Separate Statement of Undisputed Facts in Support of Motion for Summary Judgment)(Hall, Benjamin) (Entered: 10/06/2009)

Date	No.	PROCEEDINGS
11/03/2009	29	OPPOSITION by Marvin D. Horne, Laura R. Horne, Raisin Valley Farms Marketing Association, Don Durbahn, Estate of Rena Durbahn, Lassen Vineyards, LLC to 26 MOTION for SUMMARY JUDGMENT, 24 MOTION for SUMMARY JUDGMENT. (Leighton, Brian) (Entered: 11/03/2009)
11/03/2009	30	RESPONSE by Marvin D. Horne, Laura R. Horne, Raisin Valley Farms Marketing Association, Don Durbahn, Estate of Rena Durbahn, Lassen Vineyards, LLC to 26 MOTION for SUMMARY JUDGMENT. (Leighton, Brian) (Entered: 11/03/2009)
11/19/2009	31	REPLY by United States Department of Agriculture to RESPONSE to 26 MOTION for SUMMARY JUDGMENT. (Hall, Benjamin) (Entered: 11/19/2009)
12/11/2009	34	ORDER DENYING 24 Motion for Summary Judgment ; GRANTING 26 Motion for Summary Judgment, signed by District Judge Lawrence J. O'Neill on 12/09/2009. CASE CLOSED (Martin, S) (Entered: 12/11/2009)

Date	No.	PROCEEDINGS
12/11/2009	35	JUDGMENT dated *12/11/2009* in favor of Defendant against Plaintiff pursuant to order (Martin, S) (Entered: 12/11/2009)
02/04/2010	36	NOTICE of APPEAL by Marvin D. Horne, Laura R. Horne, Raisin Valley Farms Marketing Association, Don Durbahn, Estate of Rena Durbahn, Lassen Vineyards, LLC. (Attachments: # 1 Civil Appeals Docketing Statement and Service List/Representative Statement, # 2 Judgment, # 3 Ordering Denying Motion for Summary Judgment)(Leighton, Brian) (Entered: 02/04/2010)

General Docket

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Court of Appeals Docket#: 10-15270
Nature of Suit: 2891 Agricultural Acts
Marvin Horne, et al v. AGRI
Appeal From: U.S. District Court for Eastern California, Fresno
Fee Status: Paid

Docketed: 02/05/2010
Termed: 05/09/2014

Case Type Information:
1) civil
2) united states
3) null

Originating Court Information:
District: 0972-1: 1:08-cv-01549-LJO-SMS
Trial Judge: Lawrence J. O'Neill, District Judge
Date Filed: 10/14/2008

Date Order/Judgment:	Date Order/Judgment EOD:	Date NOA Filed:	Date Rec'd COA:
12/11/2009	12/11/2009	02/04/2010	02/04/2010

Date	No.	PROCEEDINGS
06/07/2010	7	Submitted (ECF) Opening brief for review. Submitted by Appellants Don Durbahn, Estate of Rena Durbahn, Laura Horne, Marvin Horne, Lassen Vineyards, LLC and Kaisin Valley Farms Marketing Association. Date of service: 06/07/2010. [7362513] (BCL)

Date	No.	PROCEEDINGS
07/21/2010	12	Submitted (ECF) Answering brief for review. Submitted by Appellee AGRI. Date of service: 07/21/2010. [7412395]--[COURT UPDATE: Attached corrected brief (footnotes). 07/22/2010 by RY] (BEH)
09/03/2010	18	Submitted (ECF) Reply brief for review. Submitted by Appellants Don Durbahn, Estate of Rena Durbahn, Laura Horne, Marvin Horne, Lassen Vineyards, LLC and Raisin Valley Farms Marketing Association. Date of service: 09/03/2010. [7463717] (BCL)
04/14/2011	24	ARGUED AND SUBMITTED TO STEPHEN R. REINHARDT, MICHAEL DALY HAWKINS and RONALD M. GOULD. [7717243] (BG)
07/25/2011	25	FILED OPINION (STEPHEN R. REINHARDT, MICHAEL DALY HAWKINS and RONALD M. GOULD) AFFIRMED. Judge: MDH Authoring, FILED AND ENTERED JUDGMENT. [7831175] (RP)

Date	No.	PROCEEDINGS
09/09/2011	30	Filed (ECF) Appellants Don Durbahn, Estate of Rena Durbahn, Laura Horne, Marvin Horne, Lassen Vineyards, LLC and Raisin Valley Farms Marketing Association petition for panel rehearing and petition for rehearing en banc (from 07/25/2011 opinion). Date of service: 09/08/2011. [7887818] (AB)
11/21/2011	39	Filed (ECF) Appellee AGRI response to Order to set response by any party to anything, Order , Combo PFR Panel and En Banc (ECF Filing) ,Combo PFR Panel and En Banc (ECF Filing) for panel and en banc rehearing, for panel and en banc rehearing (statistical entry). Date of service: 11/21/2011. [7974105]. (KBC)

Date	No.	PROCEEDINGS
12/30/2011	43	Filed (ECF) Appellants Don Durbahn, Estate of Rena Durbahn, Laura Horne, Marvin Horne, Lassen Vineyards, LLC and Raisin Valley Farms Marketing Association reply to to set response by any party to anything, , ,for panel and en banc rehearing,for panel and en banc rehearing (statistical entry). Date of service: 12/30/2011. [8016398]. (AB)

Date	No.	PROCEEDINGS
01/05/2012	44	Filed order (STEPHEN R. REINHARDT, MICHAEL DALY HAWKINS and RONALD M. GOULD) Defendant-Appellee shall file a surreply to Plaintiffs-Appellants' Reply Brief in Support of Petition for Panel Rehearing or Rehearing En Banc, filed with this court on December 30, 2011. The surreply shall specifically address, but is not limited to: (1) the relevance of Lion Raisins, Inc. v. United States, 416 F.3d 1356 (Fed. Cir. 2005), to the issues in this case; and (2) whether the Government, by claiming that the present case lies within the scope of Tucker Act jurisdiction, contradicts its previous position that Lion Raisins lies outside that scope. The surreply shall not exceed ten (10) pages, or 2800 words, and shall be filed within twenty-one (21) days of the filed date of this Order. [8020960] (SM)
02/16/2012	47	Filed (ECF) Appellee AGRI reply to to set response by any party to anything. Date of service: 02/16/2012. [8071323]. (KBC)

Date	No.	PROCEEDINGS
02/28/2012	48	Filed (ECF) Appellants Don Durbahn, Estate of Rena Durbahn, Laura Horne, Marvin Horne, Lassen Vineyards, LLC and Raisin Valley Farms Marketing Association Motion to file supplemental brief for petition for rehearing. Date of service: 02/28/2012. [8082388] (AB)
02/29/2012	49	Filed order (STEPHEN R. REINHARDT, MICHAEL DALY HAWKINS and RONALD M. GOULD) Plaintiffs-Appellants' Motion for Leave to File Supplemental Brief in Support of Petition for Panel Rehearing or Rehearing En Banc is DENIED. [8085426] (SM)

Date	No.	PROCEEDINGS
03/12/2012	52	Filed order (STEPHEN R. REINHARDT, MICHAEL DALY HAWKINS and RONALD M. GOULD) The opinion filed July 25, 2011, slip op. 9453, and appearing at ___ F.3d ___, No. 10-15270, 2011 WL 2988902 (9th Cir. 2011), is hereby amended per the Amended Opinion filed concurrently with this Order. The panel has voted to deny the petition for panel rehearing. Judges Reinhardt and Gould have voted to deny the petition for panel rehearing en banc, and Judge Hawkins has so recommended. The full court was advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing and the petition for rehearing en banc are DENIED. No further petitions for rehearing or rehearing en banc will be accepted for filing. [8098690] (RP)
03/12/2012	53	Filed amended opinion (STEPHEN R. REINHARDT, MICHAEL DALY HAWKINS and RONALD M. GOULD) [8098698] (RP)

Date	No.	PROCEEDINGS
03/20/2012	54	MANDATE ISSUED. (SR, MDH and RMG) [8111035] (LC)
06/04/2012	55	Received letter from the Supreme Court dated 06/01/2012. The application for an ext of time within which to file a petition for a writ of cert has been presented to Justice Kennedy, who on 6/1/12 extended the time to and including 7/25/12. Application No: 11A1125. [8206315] (RR)
08/01/2012	56	Received notice from the Supreme Court: petition for certiorari filed on 07/25/2012. Supreme Court Number 12-123. [8271870] (RR)
11/23/2012	57	Received notice from the Supreme Court. Petition for certiorari GRANTED on 11/20/2012. Supreme Court Number 12-123. [8412647] (RR)

Date	No.	PROCEEDINGS
06/13/2013	64	Received copy of Supreme Court opinion dated 06/10/2013. The judgment or mandate of this Court will not issue for at least twenty-five days pursuant to Rule 45. Should a petition for rehearing be filed timely, the judgment or mandate will be further stayed pending this Court's action on the petition for rehearing. Supreme Court No: 12-123. [8671896] (RR)
6/27/2013	65	Filed (ECF) Appellants Don Durbahn, Estate of Rena Durbahn, Laura Horne, Marvin Horne, Lassen Vineyards, LLC and Raisin Valley Farms Marketing Association Correspondence: Notification of Supreme Court Judgment and Request for Additional Briefing. Date of service: 06/27/2013 [8684699] (JFC)

Date	No.	PROCEEDINGS
7/2/2013	66	Filed order (STEPHEN R. REINHARDT, MICHAEL DALY HAWKINS and RONALD M. GOULD) The parties are ordered to file supplemental briefs on (1) the relevance, if any, of the Supreme Court's decision in Horne v. Department of Agriculture, 569 U.S. ___, No. 12-123 (June 10, 2013), to the resolution of this case on the merits; (2) the relevance, if any, of any other precedent handed down after the initial merits briefs were filed by the parties; and (3) whether the parties think that a further oral argument may be helpful to decision on the merits. Appellants shall file their brief no later than 21 days from the filing date of this order. Appellee's brief shall be filed within 21 days of the filing of Appellants' brief. Appellants may file an optional reply brief within 7 days of the filing of Appellee's brief. The briefs shall not exceed 2500 words. [8689076] (SM)

Date	No.	PROCEEDINGS
7/12/2013	67	Received certified copy of Supreme Court 06/10/2013 judgment. On Writ Of Certiorari to the USCA for the 9th Circuit. This Cause came on to be heard on the transcript of the record from the above court and was argued by counsel. On Consideration Whereof, it is ordered and adjudged by this Court that the judgment of the above court is reversed with costs, and the case is remanded to the USCA for the 9th Circuit for further proceedings consistent with the opinion of this Court. It Is Further Ordered that the petitioners Marvin D. Horne, et al. recover from Department of Agriculture Eight Thousand Two Hundred Forty-eight Dollars and Forty-one cent ($8,248.41) for costs herein expended. Supreme Court case number: 12-123. [8701571] (RR)

Date	No.	PROCEEDINGS
7/23/2013	68	Submitted (ECF) Supplemental Brief for review. Submitted by Appellants Don Durbahn, Estate of Rena Durbahn, Laura Horne, Marvin Horne, Lassen Vineyards, LLC and Raisin Valley Farms Marketing Association. Date of service: 07/23/2013. [8714580] (JFC)
8/13/2013	71	Submitted (ECF) Supplemental Brief for review. Submitted by Appellee USDA. Date of service: 08/13/2013. [8741287] (JPW)
8/20/2013	73	Submitted (ECF) Supplemental Brief for review. Submitted by Appellants Don Durbahn, Estate of Rena Durbahn, Laura Horne, Marvin Horne, Lassen Vineyards, LLC and Raisin Valley Farms Marketing Association. Date of service: 08/20/2013. [8750149] (JFC)
10/29/2013	76	Filed clerk order (Deputy Clerk: WL): Oral argument will be held on Friday, February 14, 2014, at 10:00 a.m. in Courtroom Three of the James R. Browning United States Courthouse, 95 Seventh Street, San Francisco, California. Each side will be allotted twenty (20) minutes to present its arguments. [8842228] (WL)

Date	No.	PROCEEDINGS
11/15/2013	78	Submitted (ECF) excerpts of record. Submitted by Appellants Don Durbahn, Estate of Rena Durbahn, Laura Horne, Marvin Horne, Lassen Vineyards, LLC and Raisin Valley Farms Marketing Association. Date of service: 06/07/2010. [8864584] (BCL)
11/18/2013	79	Submitted (ECF) supplemental excerpts of record. Submitted by Appellee USDA. Date of service: 07/21/2010. [8865348] (JPW)
12/3/2013	83	Notice of Oral Argument on Friday, February 14, 2014 - 10:00 AM Courtroom 3, 3rd Floor James R. Browning US Courthouse San Francisco, CA. Please return ACKNOWLEDGMENT OF HEARING NOTICE form to: SAN FRANCISCO Office. Please open attached documents to view details about your case. [8887195] (RB)
2/11/2014	86	Filed (ECF) Appellee USDA citation of supplemental authorities. Date of service: 02/11/2014. [8974626] (JPW)

Date	No.	PROCEEDINGS
2/12/2014	87	Filed (ECF) Appellants Don Durbahn, Estate of Rena Durbahn, Laura Horne, Marvin Horne, Lassen Vineyards, LLC and Raisin Valley Farms Marketing Association citation of supplemental authorities. Date of service: 02/12/2014. [8976372] (MWM)
2/14/2014	88	ARGUED AND SUBMITTED TO STEPHEN R. REINHARDT, MICHAEL DALY HAWKINS, and RONALD M. GOULD. [8980142] (JO) [Entered: 02/14/2014 05:04 PM]
5/9/2014	89	FILED OPINION (STEPHEN R. REINHARDT, MICHAEL DALY HAWKINS and RONALD M. GOULD) AFFIRMED.Judge: MDH Authoring, FILED AND ENTERED JUDGMENT. [9089210] (RP)
7/18/2014	90	Received letter from the Supreme Court dated 07/16/2014 regarding the application for an ext. of time within which to file a petition for a writ of cert....extended the time to and including 9/8/14. Application No: 14A44. [9175050] (RR)

Date	No.	PROCEEDINGS
9/9/2014	92	Received notice from the Supreme Court: petition for certiorari filed on 09/08/2014. Supreme Court Number 14-275. [9234311] (RR)
1/21/2015	93	Received notice from the Supreme Court. Petition for certiorari GRANTED on 01/16/2015. Supreme Court Number 14-275. [9390215] (HH)

Raisin Administrative Committee
3445 North First Street, Suite 101
P.O. Box 5217
Fresno, CA 93755

ADMINISTERING THE FEDERAL MARKETING AGREEMENT AND ORDER REGULATING THE HANDLING OF CALIFORNIA RAISINS

FAX: (559) 225-0625
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April 2, 2004
Marvin and Laura Home
Raisin Valley Farms
3678 North Modoc
Kerman, CA 93630

Subject: Notification to Deliver Reserve Raisins

Dear Mr. and Mrs. Horne:

Raisin Valley Farms filed a Notification of Intention to Handle Raisins (RAC-5) with the Raisin Administrative Committee (RAC) for the 2003/2004-crop year on August 5, 2003. The RAC has determined that during the period from August 1, 2003 through February 29, 2004 that Raisin Valley Farms processed and packed 4,497,772 pounds of Natural Seedless raisins. This determination was made based upon inspections made by Processed Products Standardization and Inspection Branch of the United States Department of Agriculture. The inspection and certification information was provided to the RAC as required under §989.59(d) of the Federal Raisin Marketing Order.

Conversion of the packed weight using a five-year industry average (0.93746) factor results in a natural condition weight of 4,797,828 pounds. This amount would also be the free-tonnage raisin amount that Raisin Valley Farms should have reported to the RAC. With the free-tonnage percentage for the 2003/2004-crop year at 70%, reported receipts of Natural Seedless raisins by Raisin Valley Farms for the period should have been 6,854,040 pounds. The Natural Seedless raisin reserve percentage for the 2003/2004-crop year is 30% and the reserve obligation for Raisin Valley Farms is 2,056,212 pounds (1,028.106 tons).

Pursuant to §989.66(b)(4), the RAC requests delivery of the Natural Seedless reserve obligation of Raisin Valley Farms of 2,056,212 pounds of natural condition Natural Seedless raisins. Reserve raisins delivered must meet the minimum grade and condition standards per §989.66(d). The RAC will have trucks at the reserve storage location indicated on the RAC-5, 2267 N. Lassen, Kerman, California, on Friday, April 9, 2004 at 8:00 a.m. to begin picking up the reserve obligation.

Sincerely,

John N. Beck
President

Cc: Maureen Pello, USDA/CAMFO

Raisin Administrative Committee
3445 North First Street, Suite 101
P.O. Box 5217
Fresno, CA 93755

ADMINISTERING THE FEDERAL MARKETING AGREEMENT AND ORDER REGULATING THE HANDLING OF CALIFORNIA RAISINS

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April 9, 2004

Marvin and Laura Horne
Raisin Valley Farms
3678 North Modoc
Kerman, CA 93630

Subject: Failure to Deliver Reserve Raisins

Dear Mr. and Mrs. Horne:

On April 2, 2004, the Raisin Administrative Committee (RAC), pursuant to §989.66(b)(4), requested delivery of 2,056,212 pounds (1,028.106 tons) of Natural Seedless reserve raisin obligation from Raisin Valley Farms. The RAC had trucks at the reserve storage location indicated on the RAC-5, 2267 N. Lassen, Kerman, California, on Friday, April 9, 2004 at 8:00 a.m. to pick up these reserve raisins. Raisin Valley Farms failed to deliver the requested reserve raisins.

The Raisin Marketing Order, §989.166(c), provides for remedy in the event a handler fails to deliver reserve tonnage raisins. The handler shall compensate the RAC the average price received by producers multiplied by the quantity of reserve

raisins not delivered plus cost incurred by the RAC on account of the handler's failure to deliver. The current established field price for Natural Seedless raisins is $810/ton.

The RAC demands remedy from Raisin Valley Farms in the amount of $832,765.86 for failure to deliver the requested reserve tonnage. Please make payment to the RAC by cashier's check by Wednesday, April 14, 2004.

Sincerely,

John N. Beck
President

Cc: Maureen Pello, USDA/CAMFO

Supreme Court, U.S.
FILED
MAR 2 - 2015
OFFICE OF THE CLERK

No. 14-275

IN THE

Supreme Court of the United States

MARVIN D. HORNE, *et al.*,

Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONERS

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March 2, 2015

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

1. Whether the government's "categorical duty" under the Fifth Amendment to pay just compensation when it "physically takes possession of an interest in property," *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012), applies only to real property and not to personal property.

2. Whether the government may avoid the categorical duty to pay just compensation for a physical taking of property by reserving to the property owner a contingent interest in a portion of the value of the property, set at the government's discretion.

3. Whether a governmental mandate to relinquish specific, identifiable property as a "condition" on permission to engage in commerce effects a per se taking.

RULE 14.1(b) STATEMENT

Petitioners are Marvin D. Horne and Laura R. Horne, d.b.a. Raisin Valley Farms, a partnership, and d.b.a. Raisin Valley Farms Marketing Association, a.k.a. Raisin Valley Marketing, an unincorporated association; Marvin D. Horne; Laura R. Horne; the Estate of Don Durbahn, and the Estate of Rena Durbahn, d.b.a. Lassen Vineyards, a partnership, plaintiffs-appellants below.

Respondent is the United States Department of Agriculture, defendant-appellee below.

RULE 29.6 STATEMENT

Petitioners have no parent corporations and no publicly held corporation owns 10% or more of their stock.

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INTRODUCTION

This case returns to the Court for a second time. Two years ago, the Court unanimously reversed a Ninth Circuit holding that the district court lacked jurisdiction to consider Petitioners' Takings Clause defense. Pet.App. 220a; *Horne v. USDA*, 133 S. Ct. 2053, 2056 (2013) ("*Horne I*").[1] On remand to the same panel, the Ninth Circuit held that the expropriation of thousands of tons of raisins, which the government is then free to sell or give away in its absolute discretion, is not a per se taking and does not require compensation. We ask this Court again to reverse.

Petitioners are a family of California raisin farmers. They are challenging an order of the United States Department of Agriculture ("USDA") issued pursuant to regulations known as the Raisin Marketing Order (or "Marketing Order"). Under the Marketing Order, the USDA requires "handlers" of raisins to set aside portions of the raisins they obtain from raisin producers, and to transfer them to the government. In the two years at issue in this case, 2002-2003 and 2003-2004, the USDA required transfer of 47 percent and 30 percent of each producer's crop, respectively. Raisin handlers who do not comply — including Petitioners here — are required to pay to the government the dollar value of the raisins, plus large punitive fines.

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[1] Citations to the Joint Appendix are to "JA." Citations to the Petition Appendix are to "Pet.App." Citations to Petitioners' Supplemental Appendix, attached to Petitioners' Reply to Brief in Opposition, are to "Supp.App."

The Ninth Circuit correctly recognized the Order as a transfer of "possessory and dispositional control" of reserve-tonnage raisins from private owners to the government. Pet.App. 25a-26a. And actual physical takings of property for government use implicate the Fifth Amendment's "categorical" rule of just compensation. *See Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012). Yet the USDA paid farmers like the Hornes nothing at all for their 2003-04 raisins, and far less than the cost of production for their 2002-03 raisins. As the court below perceived, these uncertain and insufficient payments are not "just compensation" within the meaning of the Fifth Amendment. Pet.App. 21a-22a & n.16. The regulations at issue are, in short, a textbook case of an uncompensated per se taking.

The panel's opinion on remand held nonetheless that the Marketing Order's compelled transfer of raisins or their dollar equivalent is merely a "use restriction," subject to the watered-down balancing tests for "regulatory" rather than actual physical takings. Pet.App. 1a. The panel assumed at the threshold that "paradigmatic" takings caselaw does not apply in cases where no property has *yet* changed hands, Pet.App. 15a, even though, as this Court held in *Horne I*, the applicable federal statute permits handlers to raise the Takings Clause as a *defense* before the claimed taking is enforced. The panel then reasoned, first, that the categorical compensation rule for seizures of property applies only to real property, not to personal property (like raisins), and second, that even if that categorical rule could have applied to raisins, it does not apply here because the USDA theoretically offers raisin producers something in return (never mind that the return is

often nothing at all). Each of those steps — and the panel's ultimate conclusion that the Marketing Order is a use restriction subject only to a balancing test — contradicts well-settled takings doctrine.

The seriousness of the panel's departures from established law is difficult to exaggerate. If it were really true that the government never faces a "categorical duty" of just compensation when it takes ownership of a person's movable property, *see Arkansas Game & Fish Comm'n*, 133 S. Ct. at 518, then great swaths of valuable property (ranging from cars, to pills, to bank accounts, to securities, to patents) are outside the Takings Clause's categorical protection altogether. The panel's other holdings would empower the government in a broad array of contexts to avoid categorical compensation through procedural gimmickry: by offering a discretionary possibility of partial payment in return, by imposing a fine in lieu of property and waiting to execute until judicial review is exhausted, or by "conditioning" the right to do business on transferring property to the government. These holdings would largely annul the government's duty of just compensation, not just for raisins, but for all private property.

OPINIONS BELOW

The opinion of the court of appeals on remand from this Court is reported at 750 F.3d 1128. Pet.App. 1a. This Court's opinion is reported at 133 S. Ct. 2053. Pet.App. 242a. This Court's opinion reversed an earlier opinion of the court of appeals reported at 673 F.3d 1071. Pet.App. 220a. That opinion of the court of appeals itself superseded the court of appeals' original decision which was designated for publication, but was undesignated

upon the issuance of the court of appeals' second opinion. Pet.App. 191a, 260-61a. The opinion of the district court is unpublished, and is electronically reported at 2009 WL 4895362. Pet.App. 125a.

The district court reviewed three USDA administrative decisions. The first, by a USDA Administrative Law Judge ("ALJ"), is reported at 65 Agric. Dec. 805. Pet.App. 30a. The second, on administrative appeal to a USDA Judicial Officer ("JO"), is reported at 67 Agric. Dec. 18. Pet.App. 56a. A second JO decision on reconsideration is reported at 67 Agric. Dec. 1244. Pet.App. 101a.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 2014. Pet.App. 1a. This Court granted a timely petition for certiorari on January 16, 2015.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Ninth Circuit had jurisdiction under 28 U.S.C. §§ 1291 and 1331.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides, in relevant part:

> [N]or shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

The relevant provisions of the Agricultural Marketing Agreement Act of 1937 ("AMAA"), as amended, 7 U.S.C. § 601 *et seq.*; and the *Marketing Order Regulating the Handling of Raisins Produced from Grapes Grown in California*, 7 C.F.R. Part 989 ("Raisin Marketing Order" or "Marketing Order"),

are reproduced in the appendix to the petition. *See* Pet.App. 262a-372a.

STATEMENT OF THE CASE

A. Statutory And Regulatory Framework

Under the AMAA, the USDA regulates the sale of certain agricultural products, including raisins, by promulgating "marketing orders." *See Evans v. United States*, 74 Fed. Cl. 554, 558 (2006). This case involves what one court has described as the most "draconian" of these schemes — the marketing order for California raisins, which constitute approximately 99 percent of the United States' and 40 percent of the world's raisin production. Pet.App. 225a n.7; *Evans*, 74 Fed. Cl. at 555. Unlike other marketing orders, which are periodically put to a vote of producers and terminated if they do not command a specified majority or super-majority, *see* 7 U.S.C. § 608c(19), the Raisin Marketing Order has never been put to an up-or-down revote of raisin producers since its first adoption in 1949.

The Raisin Marketing Order establishes a "reserve" program under which a specified portion of the yearly crop must be set aside "for the account of" the federal government. *Evans*, 74 Fed. Cl. at 557. While similar in some respects to other marketing orders, the Raisin Marketing Order is different in two primary ways: "[I]t effects a direct transfer of title of a producer's 'reserve tonnage' raisins to the government, and it requires physical segregation of the reserve-tonnage raisins held for the government's account." *Id.* at 558; *see also* 7 C.F.R. §§ 989.54, 989.55, 989.65, 989.66.

The raisin reserve program works as follows. Each year, the Raisin Administrative Committee ("RAC"), an agent of the USDA created by the Raisin Marketing Order, limits the percentage of raisins that may be sold in the market by dividing the raisin crop into "reserve tonnage" and "free tonnage" percentages. 7 C.F.R. §§ 989.66, 989.166. Free-tonnage raisins may be sold, while reserve-tonnage raisins must be set apart "for the account of" the RAC. §§ 989.65, 989.66(a), (b)(1). The handler must deliver the reserve-tonnage raisins to the RAC or its designee on demand, § 989.66(b)(4), and the RAC pays the costs of storage until then, § 989.66(f). Reserve percentages are established by (and unknown until) February 15 of each crop year, long after farmers have expended substantial resources for the cultivation and harvest of their crop for the year. §§ 989.21, 989.54(d).

The Marketing Order applies in theory only to "handlers" of raisins, a term defined at 7 C.F.R. § 989.15, but its real burdens fall on producers. In the ordinary case,[2] raisin farmers sell their crop to handlers, who process, pack, and sell the raisins to consumers. The handler has the legal obligation to set aside the reserve raisins, and the AMAA provides that any handler who violates a marketing order is subject to fines and penalties in a final USDA order. 7 U.S.C. §§ 608a(5), 608c(14); 7 C.F.R. § 989.166(c). But handlers pay producers only for the free-tonnage raisins. *Evans*, 74 Fed. Cl. at 557. They pay nothing for the reserve-tonnage raisins that they transfer to

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[2] We describe below the divergent business model followed by Petitioners.

the government. *Id.* Because the handler does not pay the producer for the reserve percentage of the crop, it is the producer who bears the economic burden of the program.

Once the RAC has control of the reserve-tonnage raisins, it may require their delivery to anyone chosen by the RAC to receive them, 7 C.F.R. § 989.66(b)(4), may obtain loans using reserve-tonnage raisins as security, § 989.66(g), may sell reserve-tonnage raisins to handlers for resale in export markets, §§ 989.67(c)-(e), or may direct that the raisins be sold or disposed of by direct sale or gift to United States agencies (for example, for school lunches), foreign governments, or charitable organizations, §§ 989.67(b)(2)-(4). Typically, the RAC sells most reserve raisins to exporters at less than the domestic price, using the proceeds to fund its own administrative costs and to subsidize export sales. *See* Supp.App. 1a-2a. As small independent producers, the Hornes do not engage in the export trade and thus do not benefit from these below-market sales and export subsidies. Unexpended proceeds, if any, must be remitted to producers on a pro rata basis, 7 U.S.C. § 608c(6)(E); 7 C.F.R. §§ 989.53(a), 989.66(h), but many years there is nothing left to remit.

In the two crop years involved in this case, 2002-03 and 2003-04, the USDA required farmers to turn over 47 percent and 30 percent of their raisin crops respectively. *See* RAC, *Marketing Policy and Industry Statistics, 2010* 27 (Jan. 6, 2011), *available at* http://www.raisins.org/files/Marketing%20Policy%202010.pdf (last visited Feb. 25, 2015). The reserve

raisins totaled more than 182,000 and 89,000 tons in those two years respectively. *See id.* at 25; Supp.App.1a-2a. In 2002-03, the farmers who produced those raisins were paid well below the cost of production, and considerably less than fair market value. *See* RAC, *Analysis Report* 22 (Aug. 1, 2006), *available at* http://www.raisins.org/analysis_report/analysis_report.pdf (last visited Feb. 25, 2015). In 2003-04, the government paid nothing at all for the raisins that it took and used. *See id.* at 23; *see also id.* at 55.[3]

The record in this case is confined to the two years in question, but according to RAC annual reports, there has been no raisin reserve for the last five years. In the last six years in which there was a raisin reserve, 2002-03 was the only year in which producers received any payment for their reserve raisins; in the five other years the payment was zero. *See* RAC, *Statement of Disposition & Grower Equity* (Jan. 31, 2013) (2008-09 reserve); RAC, *Statement of Disposition & Grower Equity* (Apr. 1, 2011) (2007-08

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[3] In 2002-03 the RAC gave away 2,145 tons of reserve raisins for school lunch programs and similar uses and sold 179,973 tons, largely to handlers for export, yielding $118,280,587 in revenues — an average of $649.47 per ton. Supp.App. 2a. The RAC spent $53,360,854 on export subsidies, and most of the rest on administrative expenses. Producers retained a "gross equity" of $272.73 per ton, prior to a deduction for advertising. *Id.*

In 2003-04 the RAC gave away 2,312 tons of reserve raisins and sold 86,732 tons, yielding $111,242,849, or $1,249.30 per ton. Supp.App. 1a. The RAC then spent $99,807,957 on export subsidies and *everything* else on advertising and administrative expenses, leaving nothing for the producers at all. *Id.*

reserve); RAC, *Statement of Disposition & Grower Equity* (Feb. 19, 2009) (2006-07 reserve); RAC, *Statement of Disposition & Grower Equity* (Feb. 19, 2009) (2005-06 reserve); Supp.App. 1a-2a (2002-03 and 2003-04).

B. The Hornes' Attempt To Comply Without Suffering Confiscation Of Their Raisins

The Hornes and the Durbahns ("the Hornes" or "Petitioners") are independent farmers in Fresno and Madera Counties in California. *Horne I*, 133 S. Ct. at 2058. Petitioners Marvin and Laura Horne have grown Thompson seedless grapes for raisins for nearly half a century, and Don and Rena Durbahn (Laura's parents), recently deceased, a generation longer. *Id.*; Pet.App. 33a.

Like many raisin farmers, the Hornes became increasingly frustrated with the workings of the Raisin Marketing Order, which they regard as "stealing [their] crop." Pet.App. 129a; *see also* Dan Malcolm, *California Raisin Growers Benefit from Sun-Maid Work*, Am. Vineyard, Jan. 2015, at 18-19 (reporting similar frustration from other growers in recent years). As the Hornes explained in a letter to the Secretary of Agriculture, "[t]he Marketing Order Regulating Raisins has become a tool for grower bankruptcy, poverty, and involuntary servitude." *Horne I*, 133 S. Ct. at 2058 n.3. After consulting with attorneys, university professors, and officials, the Hornes devised a new business model that they believed would allow them to comply with the law without having to set aside reserve raisins for the RAC. *Id.* at 2058.

In their new business model, the Hornes purchased their own equipment for processing and packing raisins. *Id.* That way, instead of selling their crop to a traditional handler, they could process their raisins themselves and sell them directly to wholesale customers such as food-processing companies and bakeries, eliminating the middleman. *Id.* Because the obligations of the Raisin Marketing Order apply only to "handlers," the Hornes believed they would not be required to disgorge the "reserve" portion of their raisin crop to the RAC. *Id.*

The Hornes allowed some 60 of their neighbors to lease this equipment for their own raisins for a per-ton fee. *Id.* The Hornes and their neighbors coordinated sales through the "Raisin Valley Farms Marketing Association," which connected prospective purchasers with producers on a rotational basis. *Id.*; Pet.App. 38a. Purchasers would remit the proceeds to the Raisin Valley Farms Marketing Association, which would then disburse payment to the producers, less the rental fee for use of the equipment. Pet.App. 38a-39a, 130a-131a. Accordingly, the producers who used the Hornes' equipment received full market price for their raisins, without having portions of their crop segregated and turned over to the government. The Hornes believed that because they did not purchase raisins from these other producers — but merely leased equipment and personnel — they were not "handlers" with respect to these raisins either.

Because they believed this way of operating would avoid the reserve requirement, the Hornes did not set aside reserve-tonnage raisins for 2002-03 and

2003-04, the two years relevant to this case, for either their own raisins or those of other producers who leased their equipment. Pet.App. 132a-133a; *Horne I*, 133 S. Ct. at 2059. The RAC believed otherwise. First, the RAC sent a truck to the Hornes' facility to seize the reserve raisins. JA29-30. Then, when the Hornes refused entry, the RAC issued a demand letter requiring the Hornes to pay the dollar equivalent. JA31-32; *see also* Pet.App. 41a, 69a; Transcript of Oral Argument at 32:2-:8, *Horne I*, 133 S. Ct. 2053 (No. 12-123) ("*Horne I* Tr."). The Hornes refused to comply with either the attempted seizure of raisins or the demand for cash.

C. Administrative Proceedings

On April 1, 2004, the Administrator of the Agricultural Marketing Service initiated an enforcement action within the USDA, claiming that Petitioners violated the AMAA. Pet.App. 30a-31a; *Horne I*, 133 S. Ct. at 2059. The Hornes defended on both statutory and constitutional grounds. They contended that under their innovative business model they were not "handlers in that they never obtained any raisins through purchase or transfer of ownership ... and argue[d], therefore, they did not *acquire* raisins within the meaning of the Raisin Order." Pet.App. 31a; *Horne I*, 133 S. Ct. at 2059. Their principal constitutional defense was that the requirement that they transfer possession of reserve raisins to the government without just compensation is an unconstitutional taking under the Fifth Amendment.

A USDA ALJ disagreed. Pet.App. 32a-33a; *Horne I*, 133 S. Ct. at 2059. The Hornes were held responsible as handlers of their own raisins as well

as the raisins produced by their neighbors, on the theory that the Hornes had "acquired" those raisins within Marketing Order' specialized terminology when the raisins arrived at the Hornes' processing facility. Pet.App. 47a-50a, 52a; *see also* Pet.App. 84a.

As to the Takings Clause defense, the ALJ reasoned that the requirement that Petitioners hand over their raisins to the USDA without compensation "cannot be used as grounds for a taking claim since handlers no longer have a property right that permits them to market their crop free of regulatory control." Pet.App. 45a; *Horne I*, 133 S. Ct. at 2059. Thus, the Hornes were fined the monetary equivalent of all the raisins processed in their facility, plus penalties. Pet.App. 53a-54a.

On appeal, a USDA JO affirmed. Pet.App. 98a-99a, 122a-123a; *Horne I*, 133 S. Ct. at 2059. The JO agreed with the ALJ that the Hornes had "acquired" all raisins processed at their facility and thus were handlers who had the legal obligation to set aside the reserve pool raisins. As to Petitioners' takings defense, the JO claimed that he had "no authority to judge the constitutionality of the various statutes administered by the United States Department of Agriculture." Pet.App. 78a; *but see United States v. Ruzicka*, 329 U.S. 287, 294 (1946) (challenges under the AMAA "formulated in constitutional terms ... in the first instance must be sought from the Secretary of Agriculture").

The JO determined that, as "handlers," Petitioners violated 7 C.F.R. § 989.66 and § 989.166 by failing to hold reserve raisins for the 2002-03 and 2003-04 crop years. Pet.App. 97a-98a. The JO ordered Petitioners to pay $483,843.53, the dollar

equivalent of the raisins that should have been held in reserve for the 2002-03 (634,427 pounds) and 2003-04 (611,159 pounds) crop years, as determined by the "field price" typically paid to producers for free-tonnage raisins in those years (hereafter, the "dollar equivalent" component of the fine). Pet.App. 109a-110a, 123a; 7 C.F.R. § 989.54(b). The JO also ordered Petitioners to pay an additional $202,600 in civil penalties pursuant to 7 U.S.C. § 608c(14)(B), $177,600 of which was imposed for failure to comply with the reserve requirement (hereafter, the "penalty" component of the fine). Pet.App. 98a, 122a. The remaining $25,000 is not at issue in this petition. Finally, the JO imposed an additional $8,783.39 in unpaid assessments pursuant to 7 C.F.R. § 989.80(a), which also is not at issue here. Pet.App. 112a, 123a.

It is important to emphasize that Petitioners bore the entirety of both the dollar equivalent and penalty components of the fine, and that the fine covered both Petitioners' own raisins and those allegedly "acquired" from their neighbors who used Petitioners' equipment. The other producers received full market value for their crop and were not charged any part of the fine.

D. Judicial Proceedings

Petitioners sought review of the agency decision in the United States District Court for the Eastern District of California under 7 U.S.C. § 608c(14)(B). Again, they presented both their statutory argument that they were not handlers and their constitutional argument that the government's appropriation of reserve raisins would be an uncompensated per se

taking. The District Court granted summary judgment for the USDA. Pet.App. 189a-190a.

Petitioners appealed. On July 25, 2011, a panel of the Ninth Circuit affirmed the judgment in its entirety. After rejecting Petitioners' statutory argument, the panel held that no taking occurs under the regulatory scheme — and no compensation is required — when "the Raisin Marketing Order applies to the Hornes only insofar as they voluntarily choose to send their raisins into the stream of interstate commerce." Pet.App. 208a. After Petitioners filed a rehearing petition, the government argued — for the first time — that the court lacked jurisdiction over the takings issue. The government contended that the Hornes should be required to pay the fine in its entirety and sue in the Court of Federal Claims to get it back. On March 12, 2012, the panel filed a substitute opinion dismissing Petitioners' Takings Clause defense for lack of jurisdiction. Pet.App. 236a, 241a.

The Hornes petitioned this Court for certiorari, which was granted. On June 10, 2013, this Court unanimously reversed the Ninth Circuit and remanded for that court to reconsider Petitioners' arguments on the merits. The Court held that the fine was imposed on the Hornes in their capacity as handlers, *Horne I*, 133 S. Ct. at 2060-61, and that they were entitled to challenge its constitutionality in district court before being required to comply, *id.* at 2063-64.

On remand before the same panel, the court ordered limited supplemental briefing addressing the Supreme Court's opinion and relevant new authority. After oral argument, it issued a third opinion on May

9, 2014 affirming the district court, this time again on the merits.

The panel first considered and rejected the government's argument that the Hornes lack standing to challenge the USDA order as a taking because not all the raisins for which they were held responsible were the Hornes' property. Pet.App. 11a-12a. The court noted that the injury suffered by the Hornes was the imposition of a penalty for their refusal to "physically convey raisins to the RAC." Pet.App. 13a. This penalty included the "dollar equivalent" of all the raisins processed at the Horne's facility (whether the Hornes owned the raisins or not), plus a "civil penalty" for noncompliance. Pet.App. 8a n.6. The court explained that the USDA "specifically linked a monetary exaction (the penalty imposed for failure to comply with the Marketing Order) to specific property (the reserved raisins). The Hornes faced a choice: relinquish the raisins to the RAC or face the imposition of a penalty." Pet.App. 14a. Accordingly, the court reasoned that the constitutionality of the penalty turns on whether the underlying obligation of handlers to convey reserve raisins to the RAC would be a Fifth Amendment taking. If so, "the Secretary cannot lawfully impose a penalty for non-compliance. But if the receipt of raisins does not violate the constitution, neither does imposition of the penalty." Pet.App. 15a. This reasoning applied to all the raisins for which the Hornes were fined.

The panel then considered whether the Raisin Marketing Order effects a per se taking of Petitioners' property for which just compensation is categorically required. Observing that "the

government neither seized any raisins from the Hornes' land nor removed any money from the Hornes' bank account," Pet.App. 15a, it held that the Order did not effect a "paradigmatic" taking, and so entered what it called the "doctrinal thicket of the Supreme Court's regulatory takings jurisprudence," Pet.App. 16a.[4] The panel then supplied two reasons for determining that the Marketing Order does not implicate a categorical duty of compensation. First, the per se takings rule applicable when the government takes possession of property, in the panel's view, extends only to *real* property and does not "govern controversies involving personal property" such as raisins. Pet.App. 20a. Second, because the Hornes retained benefits flowing from use of the raisins by the RAC and a contingent right to the proceeds not spent by the RAC, "the Hornes did not lose all economically valuable use of their personal property." Pet.App. 20a-21a.[5]

After concluding that no per se taking had occurred, the panel characterized the Raisin

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[4] Petitioners had always been clear that they were not arguing a regulatory taking, but a per se taking. *See* Pls' Pet. for Rehr'g at 11, *Horne v. USDA*, No. 10-15270 (9th Cir. Sept. 8, 2011) ("[T]his is not a regulatory takings case."); *see also* Pls' Supp. Br. at 10, *Horne v. USDA*, No. 10-15270 (9th Cir. Jul. 23, 2013) ("In dismissing the Hornes' takings defense, the panel distinguished *regulatory* takings decisions. Under *Koontz*, however, the Hornes' defense must be evaluated under a '*per se* takings approach' rather than the more forgiving *Penn Central* test.") (citation omitted).

[5] The government did not raise either of the panel's theories in supplemental briefs or in oral argument, and it did not defend them in its Brief in Opposition before this Court.

Marketing Order as a use restriction rather than a physical taking, Pet.App. 25a, and considered whether the Raisin Marketing Order satisfied the "'nexus and rough proportionality'" rule applied to land-use exactions under this Court's decisions in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Pet.App. 22a-23a. The Court held that it did, reasoning that there is "a sufficient nexus between the means and ends of the Marketing Order" and that "[t]he structure of the reserve requirement is at least roughly proportional ... to Congress's stated goal of ensuring an orderly domestic raisin market." Pet.App. 29a. The panel therefore concluded that the Raisin Marketing Order "do[es] not constitute a taking under the Fifth Amendment." *Id.* According to the panel, "it is to Congress and the Department of Agriculture to which the Hornes must address their complaints." *Id.*

The Hornes petitioned for certiorari a second time, which this Court granted once more.

SUMMARY OF ARGUMENT

The core protection of the Takings Clause is the requirement that the government must pay just compensation whenever it "physically takes possession" of "an interest" in property. *See Arkansas Game & Fish Comm'n*, 133 S. Ct. at 518 (internal quotation omitted). This Court has referred to such appropriations as "per se," or "categorical," physical takings. Such a taking occurs (whether or not formal title passes) when the government takes possession of property for its own use or when it effects a permanent physical occupation of property.

This case falls squarely in this protected category: Each year the RAC, which is an agent of the USDA, demands that handlers physically set aside a percentage of the raisin crop, over which the RAC obtains complete dominion and control. The RAC can give the reserve raisins away; it can use them for collateral on a loan; and it can — and usually does — sell them. It then uses the proceeds in its discretion to fund its own administrative expenses as well as subsidies for raisin exporters. Only if money is left over do the producers receive anything for the raisins taken from them. That is a textbook example of an uncompensated per se taking.

Each of the three questions presented arises from the panel's attempts to redefine the compelled transfer of raisins as something other than a per se taking. The panel's reasons, in turn, all reflect a common flaw, namely, application of this Court's *regulatory* takings jurisprudence to a case involving the government's attempted *physical* seizure of raisins or their cash value. *See Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 323-24 (2002) (explaining that it is "inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa"). And each contradicts more specific direction from this Court.

First, the panel's holding that per se physical takings are limited to real property and not to personal property contradicts a line of this Court's cases that have applied the per se takings rule to personal property, *see, e.g.*, *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980)

(applying Takings Clause to money earned as interest on an interpleader fund), and cannot be squared with text, purpose, or original understanding of the Takings Clause.

Second, the panel's holding that the Hornes did not suffer a per se taking because they benefitted from the Raisin Marketing Order and retained a theoretical right to any residual proceeds of the reserve raisins (even if they were zero) contradicts cases requiring compensation even when the owner of occupied property does retain an interest. *See, e.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 438 & n.16 (1982).

Third, the panel's holding that the USDA's taking of title to the reserve-tonnage raisins should be analyzed as a mere restriction on the Hornes' use of the raisins in commerce directly contradicts this Court's explicit holding, reaffirmed recently in *Koontz*, that a seizure of ownership can never be justified in such terms. *See Loretto*, 458 U.S. at 439 n.17; *see also Koontz v. St. John's River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594-95 (2013) ("Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them.").

The panel's errors are distinct, but they all threaten the same effect: They convert forced transfers of property ownership to the government into mere regulatory restrictions, subject only to weak balancing tests. A government seizure of personal property, according to the panel, is *never* more than a regulatory act. And under the panel's reasoning, the government could structure virtually any taking of any property whatsoever — even an

explicit confiscation of title and possession — as mere regulation, effectively eviscerating the per se takings rule that has protected property rights in the United States for centuries. This Court must not allow that to remain the law.

ARGUMENT

I. THE RAISIN MARKETING ORDER WORKS A PHYSICAL TAKING FOR WHICH JUST COMPENSATION IS CATEGORICALLY REQUIRED.

Presumably, no one would doubt that a physical taking had occurred if the RAC drove up to the Horne's farm in a truck and appropriated the reserve-tonnage raisins at gunpoint. Pet.App. 207a-208a. It is no different when the government defines the Hornes as a handler and requires them to deliver those same raisins on pain of a substantial fine. This case is procedurally unusual because the Hornes, thinking they had devised a legal alternative, refused to deliver the reserve raisins to the RAC and were required to pay the dollar equivalent instead, plus a civil penalty. But the difference is ultimately superficial, for this Court has explicitly held that a taking of money in lieu of identifiable property is a taking, and the imposition of a fine for refusing to comply with an order that would be an unconstitutional taking is also a violation of the Takings Clause.

As the Ninth Circuit correctly realized, the constitutionality of the fine imposed on the Hornes rises or falls on whether the underlying compelled transfer of raisins without just compensation is constitutional. *See* Pet.App. 15a. Since — as the Ninth Circuit also correctly realized — the Raisin

Marketing Order entails "the loss of possessory and dispositional control" over the reserve raisins, Pet.App. 25a-26a, it is a per se taking.

A. The Raisin Marketing Order Works An Uncompensated Physical Taking Of Reserve-Tonnage Raisins.

As this Court's previous brush with this case demonstrated, the procedural context of this case is complicated — but the basic structure of the Raisin Marketing Order is not. Simply put, the Marketing Order physically deprives raisin producers of a large portion of their raisin crop and compels transfer of those raisins to the RAC, the agent of the USDA, without just compensation.[6] Unlike some better-known agricultural programs, the Marketing Order is not merely a regulation of the quantity of raisins that producers may grow or take to market. It goes an additional step: It compels transfer of the reserve raisins to the government, for the government's own use or sale. It is that extra step that makes the Marketing Order a per se taking.

Simply describing the Marketing Order makes the point. Raisin producers give up physical possession of reserve-tonnage raisins, and raisin handlers must store those raisins "separate and apart" from free-tonnage raisins, "for the account of"

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[6] No one disputes that the RAC is an agent of the federal government. *Cf. Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 560-62 (2005) (speech by beef marketing order committee qualifies as "government speech"). USDA regulations create the RAC, determine its membership, establish its powers, and set its internal procedures. *See* 7 C.F.R. §§ 989.26-.39, 989.54.

the RAC. 7 C.F.R. §§ 989.66(a), (b)(2). Although handlers physically maintain the reserve-tonnage raisins at first, the RAC pays the costs of storage. § 989.66(f). The handler must deliver the reserve-tonnage raisins to the RAC or its designee on demand. § 989.66(b)(4). Once the reserve is set and the reserve-tonnage raisins are segregated, power to dispose of those raisins lies entirely with the RAC. The RAC may use the raisins as collateral for loans, § 989.66(g), and it can sell or give them away at its discretion, §§ 989.67(b)-(e). Some are used for public purposes such as school lunches. *Horne I*, 133 S. Ct. at 2058. The vast majority are sold to certain handlers for export. The RAC uses the proceeds from sale of reserve raisins to fund its own administrative costs as well as export subsidies — the largest use of RAC revenues — which enable raisin exporters to make a profit despite the gap between U.S. market prices and global prices. The Hornes are not exporters, and receive no benefit from these gifts, sales, or subsidies.

From the growers' perspective, the effect of the Raisin Marketing Order is to deprive them of the right "'to possess, use and dispose of'" their raisins and to hand that right over to the United States. *See Loretto*, 458 U.S. at 435 (quoting *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945)); *Dugan v. Rank*, 372 U.S. 609, 614, 616 (1963) (physical taking where government diverted water in which landowners had riparian and other water rights). The Ninth Circuit accurately described this as the "loss of possessory and dispositional control" of the reserve raisins. Pet.App. 25a-26a.

The RAC's authority under federal law to demand that reserve raisins be physically segregated and delivered, and then to use and dispose of the raisins at its discretion, is sufficient to establish a physical taking for which just compensation is categorically required. That authority distinguishes the Raisin Marketing Order from regulatory schemes that simply restrict when agricultural products may be sold, how many, or in what markets. Such regulations could raise *regulatory* takings concerns (especially if they eliminate all the value of the product), but they would not implicate the categorical rule applicable when the government takes an interest in property for itself.

Until its Brief in Opposition in this Court, the government routinely described the Raisin Marketing Order as requiring the transfer of "title" to the reserve raisins to the RAC, even though the precise term "title" does not appear in the AMAA. For example, the Assistant to the Solicitor General informed this Court at oral argument that "the title to the reserve raisins passes as a matter of law from the producer to the Raisin Administrative Committee." *Horne I* Tr. 45:17-:24; *see also* U.S. Br. at 43, *Horne v. USDA*, No. 10-15270 (9th Cir. Jul. 21, 2010) (arguing that "'passing title ... to the RAC'" is an "'admission ticket'" to the raisin market) (quoting *Evans*, 74 Fed. Cl. at 563). That is consistent with the legal analysis of the district court below, Pet.App. 179a ("Title to the 'reserve tonnage' portion of the producer's raisins automatically transfers to the RAC[.]"), and of other federal courts that have considered the Marketing Order. *See Evans*, 74 Fed Cl. at 558 (explaining that the Raisin Marketing Order "stands out from most of its counterparts"

because it "effects a direct transfer of title of a producer's 'reserve tonnage' raisins to the government").

In every real sense, the RAC does in fact take title: It takes possession, physical control, and the right to sell or give the raisins away. If it did not have title, it could not sell the raisins or use them as collateral. Producers retain not a claim on the reserve raisins themselves, but only a contingent interest in the pool of money left over after the RAC sells the raisins and uses the proceeds for its own purposes. 7 U.S.C. § 608c(6)(E); 7 C.F.R. §§ 989.53(a), 989.66(h). As the Federal Circuit explained in *Lion Raisins, Inc. v. United States*, "once the raisins were transferred to the RAC, [the producer] no longer had a property interest in the raisins themselves, but only in its share of the reserve pool proceeds as defined by the regulations." 416 F.3d 1356, 1369 n.9 (Fed. Cir. 2005). That has heretofore been common ground.

But this Court need not determine whether the RAC actually takes title in any technical sense. When the government takes "'possession and control'" of property it is treated "*as if* the Government held full title and ownership." *Loretto*, 458 U.S. at 431; *United States v. United Mine Workers of Am.*, 330 U.S. 258, 284-85 (1947) (plurality) (similar). This Court's caselaw brims with cases identifying categorical physical takings when the government seizes the use and disposition of property, or occupies it, notwithstanding the property owner's retention of title. *See, e.g.*, *Loretto*, 458 U.S. at 438; *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979); *United States v. Pewee Coal*,

341 U.S. 114, 118-19 (1951); *United States v. Causby*, 328 U.S. 256, 266 (1946); *General Motors*, 323 U.S. at 383-84; *United States v. Russell*, 80 U.S. 623, 628 (1871); *see also Koontz*, 133 S. Ct. at 2600 (explaining that there is a per se taking "when the government commands the relinquishment of funds linked to a specific, identifiable property"); *Yee v. City of Escondido*, 503 U.S. 519, 522 (1992) ("Where the government authorizes a physical occupation of property (*or* actually takes title), the Takings Clause generally requires compensation.") (emphasis added). The RAC's seizure of the right to possess and dispose of the raisins thus amounts to a taking no matter who has formal title.

We anticipate that the government may argue that the Marketing Order does not effect a per se taking because the program's ostensible purpose is to benefit producers like the Hornes by stabilizing prices. Such an argument would be misplaced. Any benefit to raisin producers resulting from "price stabilization" — and we dispute that there is any net benefit — arises from the *volume* controls on free-tonnage raisins, not the compelled transfer of reserve-tonnage raisins to the RAC. Once market supply has been restricted, under no plausible economic theory do the Hornes or any other independent, non-exporting producer benefit by the crucial extra step of allowing the government to expropriate the reserve raisins, sell them or give them away (defeating the purpose of the volume control in the first place), and spend the money on subsidies for industry players who export raisins.

The Court must not simply *assume* that the Hornes gained any benefit from the program. There

is no evidence in the record to support such an assumption, and it requires an array of dubious economic assumptions to have any validity.[7] *See Bassett, New Mexico LLC v. United States*, 55 Fed. Cl. 63, 76 (2002) (refusing to apply an offset because the United States did not provide any evidence in the trial record to substantiate the alleged special benefit).

In any event, the claim of an offsetting benefit to the Hornes — if relevant in any way at all — would pertain only to calculating the amount of just

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[7] In order for a raisin grower who has lost 47% of his crop to the government to be better off, the price of raisins would have to almost double. There is no evidence in the record of such extraordinary price sensitivity. Moreover, if the volume controls actually have the effect of maintaining above-market prices, hence supracompetitive profits to growers, this would simply attract more producers into the industry, dissipating any benefits over the long run. Even in the shorter run, volume controls calculated as a percentage of crops already grown — in contrast to volume controls based on reducing acreage or production levels — have the perverse effect of stimulating production while discouraging marketing. Additionally, in order for the raisin reserve to benefit independent non-exporting growers, one would also have to assume that the RAC's own below-market sales and give-aways do not counteract the price effects of the volume controls. Finally, given that raisins grown abroad may be imported into the United States without being subject to the volume controls, there is at least some danger that volume controls hurt American farmers while driving up world prices, to the benefit of foreign growers.

We are not asking this Court to engage in economic calculations of this sort. We mention these complications just to make clear why the Court should not swallow wholesale any assertions the government may make that the Marketing Order benefits growers in the Hornes' position.

compensation, not to whether there was a per se taking in the first place. The amount of just compensation is not a point of contention in this case because the Department of Agriculture itself valued the property when it imposed a "dollar equivalent" fine on the Hornes. As the Court held in *Horne I*, there is no need for the Hornes to send money to USDA and then sue to get it back. 133 S. Ct. at 2063-64. The proper relief in this case is simply to reverse the USDA order, after which there will be no taking and no need for compensation.

B. The Procedural Posture Of This Case Does Not Make The Raisin Marketing Order Any Less A Categorical Taking.

Throughout this case, the government has persisted in asking a misleading question: What was taken? The answer is that nothing has been taken *yet*. The panel considered it legally significant that the Hornes have so far avoided any property changing hands. In the panel's view, "[b]ecause the government neither seized any raisins from the Hornes' land nor removed any money from the Hornes' bank account," there was no "paradigmatic" physical taking, and the panel instead had to "enter the doctrinal thicket of the Supreme Court's regulatory takings jurisprudence." Pet.App. 15a-16a. Distinguishing this case in that way was error: The Hornes have raised the Fifth Amendment as a *defense* to an order that, if enforced, would be a per se taking. The applicable analysis is the same as if the government had actually obtained the Hornes' property.

No raisins have changed hands in this case because when the RAC's truck arrived to receive reserve-tonnage raisins, the Hornes refused to hand any raisins over. JA31-32. Instead, all the raisins processed at the Hornes' facility were sold directly to purchasers, and the proceeds were remitted to the raisin producers, who retained title to their raisins until the sale. Because the RAC was unable to physically obtain the reserve-tonnage raisins, USDA has imposed a fine in order to extract the value of those raisins and to penalize the Hornes for retaining and selling them.

The Ninth Circuit's approach has the effect of rendering this Court's decision in *Horne I* ineffectual. The panel's previous decision was that no court had jurisdiction to consider the Hornes' Takings Clause defense until after they had paid the fine and sued to get it back. Pet.App. 236a. This Court reversed, holding that the AMAA allows handlers to challenge alleged takings as a defense to a USDA enforcement action, without first disgorging raisins or money. *Horne I*, 133 S. Ct. at 2063 ("[I]t would make little sense to require the party to pay the fine in one proceeding and then turn around and sue for recovery of that same money in another proceeding.") (citing *Eastern Enters. v. Apfel*, 524 U.S. 498, 520 (1988)). That holding tallies with this Court's explanation in *Koontz* that the government's "*command[]*" to relinquish money "linked to a specific, identifiable property interest" triggers a categorical takings analysis, not necessarily the payment itself. 133 S. Ct. at 2600 (emphasis added). But now the Ninth Circuit has resurrected a version of its prior position, holding that if the Hornes challenge the taking before it has actually taken

place, they lose the benefit of per se takings doctrine and are relegated to the "doctrinal thicket of ... regulatory takings jurisprudence." Pet.App. 16a. The courthouse door remains closed to the per se takings claim the Petitioners have been seeking to assert. Surely that is not what *Horne I* meant.

Both components of the fine imposed on the Hornes are legally equivalent to a physical taking. As to the dollar equivalent, this Court has held for more than a century that the government's assessment of the monetary value of property is itself analyzed as a taking. In *Village of Norwood v. Baker*, city officials realized they could not seize a strip of land for a municipal street expansion project without paying compensation, and instead imposed an "assessment" of "a sum equal to that paid for the land taken for the street" plus "the costs and expenses connected with the condemnation proceedings." This Court treated that as just as much a taking as if the city had taken the land itself. 172 U.S. 269, 271 (1898).

The Court reaffirmed that principle only two years ago in *Koontz*. As the majority in *Koontz* explained, "when the government commands the relinquishment of funds linked to a specific, identifiable property interest ... a 'per se takings approach' is the proper mode of analysis under the Court's precedent." 133 S. Ct. at 2600 (alteration omitted). Although the Court in *Koontz* divided on other issues, this point was unanimous. *See id.* at 2608-09 (Kagan, J., dissenting) (explaining that *Village of Norwood* "prevent[s] circumvention of the Takings Clause by prohibiting the government from imposing a special assessment for the full value of a

property in advance of condemning it"). The monetary value (or "dollar equivalent") portion of the fine is a textbook example of a "government command[]" to "relinquish[] funds linked to a specific, identifiable property interest"; it must therefore be analyzed as a per se taking.

As to the penalty component of the fine, an almost equally longstanding line of cases holds that fines for refusal to submit to unconstitutional takings may be challenged under the Takings Clause just as surely as a physical seizure. In *Missouri Pacific Railway Co. v. Nebraska*, the Court analyzed as a taking — and reversed — a fine imposed on a railroad for refusal to surrender property for a grain elevator. 217 U.S. 196, 205-08 (1910) (Holmes, J.). That aligns with well-understood principles of constitutional remedies. The government can violate a constitutional right in two ways: by preventing its exercise or by penalizing its exercise. The government can prevent a speaker from speaking or it can fine her for exercising her right to speak; both actions violate the freedom of speech. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995). By the same token, sometimes the government sends in its trucks and takes raisins without compensation, and sometimes it fines the raisin handler for refusing to turn them over. Both actions equally violate the Takings Clause. *Missouri Pac. Ry.*, 217 U.S. at 205-208; *Wilkie v. Robbins*, 551 U.S. 537, 583 (2007) (Ginsburg, J., dissenting) ("Correlative to the right to be compensated for a taking is the right to refuse to submit to a taking where no compensation is in the offing.").

In short, for purposes of determining whether a per se taking is involved, it does not matter whether the government takes the raisins or their monetary equivalent, and it does not matter whether the taking occurs before or after the property owner has his day in court. The constitutionality of the fine "rises or falls on the constitutionality of the Marketing Order's reserve requirement" and attendant transfer of reserve raisins to the RAC. Pet.App. 13a.

II. THE NINTH CIRCUIT'S REASONS NOT TO FIND A CATEGORICAL TAKING ARE WITHOUT MERIT.

The panel's conclusion that the Raisin Marketing Order did not work a categorical physical taking in this case led it to "enter the doctrinal thicket of the Supreme Court's *regulatory* takings jurisprudence" rather than enforcing the straightforward "categorical requirement" of compensation for a straightforward taking of private property for a public use. Pet.App. 16a (emphasis added). In the course of its wanderings, the panel left an extraordinary trail of doctrinal misunderstanding.

A. The Fifth Amendment's Categorical Duty To Compensate Physical Takings Applies To Takings Of Personal Property.

The panel began its analysis with the observation that "[t]he Marketing Order operates against personal, rather than real, property." Pet.App. 18a. "Because the Takings Clause undoubtedly protects personal property," the panel acknowledged, "this distinction does not mean the Takings Clause is inapplicable." *Id.* But the panel read this Court's

decisions in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and *Loretto* to "make clear the Takings Clause affords more protection to real than to personal property." Pet.App. 19a. Specifically, the panel concluded that *Loretto*'s application of per se taking status to permanent physical occupations does not "govern controversies involving personal property." Pet.App. 20a.

Under the panel's holding, the government has a categorical obligation to pay just compensation for a seizure of one's house, but it can take away one's car, furniture, refrigerator, books, silver, and clothes subject only to balancing tests applicable to regulatory takings. *See, e.g., Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978). For all of that property, the panel would write away the central bulwark of the Fifth Amendment.

It bears mention that this holding was the panel's own creation; the government has never argued that takings of personal property cannot be per se takings, and it tellingly refrained from adopting or defending this portion of the decision below in its Brief in Opposition. We nonetheless will address the argument despite suspecting that there is no genuine dispute between the parties on this ground.

The panel's holding that takings of personal property cannot be per se takings contradicts the precedents of this Court and all other federal appellate courts to consider the question and violates both the history and the text of the Fifth Amendment.

1. The panel's decision contradicts this Court's binding precedent.

This Court has never held — or even hinted — that personal property is not subject to per se Takings Clause principles, and many times it has held the contrary. For example, the Court categorically required compensation for taking "fixtures," including removable "trade fixtures," on the ground that "[a]n owner's rights in these are no less property within the meaning of the Fifth Amendment than his rights in land and the structures thereon erected." *General Motors*, 323 U.S. at 383-84; *see United States v. Burnison*, 339 U.S. 87, 93 n.14 (1950) ("An authorized declaration of taking or a requisition will put realty *or personalty* at the disposal of the United States for 'just compensation.'") (emphasis added). This is black letter law. 2-5 Nichols on Eminent Domain § 5.03(5)(d) (3d ed. 2014) ("Compensation must be paid to all owners who have had their tangible personal property taken as a result of eminent domain."). Indeed, the Court routinely applied Takings Clause protections to personal property even before regulatory takings were covered by the Clause at all. *See Russell*, 80 U.S. at 628 (federal seizure of use of steamboats during the Civil War); *United States v. Palmer*, 128 U.S. 262, 271 (1888) (federal use of a patent).

More recently, this Court has applied the per se taking rule when the government seizes fungible personal property such as money. In *Webb's Fabulous Pharmacies*, this Court applied a per se analysis to appropriation of interest in an

interpleader fund. As the Court explained, "a State, by *ipse dixit*, may not transform private property into public property without compensation." 449 U.S. at 164. Similarly, in *Koontz* the Court stated that "when the government commands the relinquishment of funds linked to a specific, identifiable property interest ... , a 'per se takings approach' is the proper mode of analysis under the Court's precedent." 133 S. Ct. at 2600 (alteration omitted) (citing *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 235 (2003)). By the same token, intangible property such as a bondholder's contractual rights "are a form of property and as such may be taken for a public purpose *provided that just compensation is paid*," *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 19 n.16 (1977) (emphasis added); *see also Armstrong v. United States*, 364 U.S. 40, 49 (1960) (taking of liens on shipbuilding materials); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 10 (1949) (taking of the intangible "going concern value" of a business).

Circuit court decisions have been even more explicit in rejecting the argument that personal property is not protected by per se takings doctrine. In *Nixon v. United States*, the United States "argue[d] that the per se takings doctrine applies only to the physical occupation of real property," and so was inapplicable to the papers of President Richard Nixon. 978 F.2d 1269, 1284 (D.C. Cir. 1992). The appellate court rejected that argument as "fail[ing] for want of authority or logic." *Id.* Imposing a distinction between personal and real property "would be purely artificial," for "[o]ne may be just as permanently and completely dispossessed of personal property as of real property." *Id.* at 1285. Finding

that a per se taking of the presidential papers had occurred, the court concluded that "the constitutional remedy of just compensation is required," and remanded "for a determination of compensation due." *Id.* at 1287.

Similarly, in *Cerajeski v. Zoeller* the Seventh Circuit held that a State's "confiscation" of interest in a bank account was a taking for which compensation was categorically owed. 735 F.3d 577, 580, 583 (7th Cir. 2013). In reaching that conclusion, the court analogized the taking to a neighbor who occupies an apple orchard and physically takes the apples. *Id.* at 580; *see also Warner/Elektra/Atl. Corp. v. County of DuPage*, 991 F.2d 1280, 1285 (7th Cir. 1993) ("It is rare for American governments to requisition personal property, but sometimes they do so and when they do they have to pay just compensation."). In *Anderson v. Spear*, the Sixth Circuit held that a law requiring political campaigns to turn over leftover contributions to the State after an election was a physical taking automatically requiring just compensation. 356 F.3d 651, 668-69 (6th Cir. 2004) (citing, *e.g.*, *Brown*, 538 U.S. 216). Decades ago, the Fifth Circuit applied a per se taking analysis to a federal appropriation of Lee Harvey Oswald's "personal effects," *Porter v. United States*, 473 F.2d 1329, 1331 (5th Cir. 1973), and the Tenth Circuit applied it to a taking of fish farmed on condemned land, *see United States v. Corbin*, 423 F.2d 821, 824 (10th Cir. 1970). *See also Philip Morris, Inc. v. Reilly*, 312 F.3d 24, 51 (1st Cir. 2002) (Selya, J., concurring in the judgment) ("Limiting per se takings analysis to cases involving real property is a crude boundary with no compelling basis in the law.").

In holding that the per se taking rule applies only to real property, the Ninth Circuit stands alone.

2. The panel's decision is inconsistent with the Takings Clause's history and text.

The Ninth Circuit's interpretation conflicts with the history and text of the Takings Clause. As an historical matter, uncompensated takings of personal property such as horses, vehicles, food, blankets, and supplies by the army likely were the animating events that led to the Takings Clause. Henry St. George Tucker, author of the first treatise on the United States Constitution, observed that the Takings Clause was "probably" enacted in response to "the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practiced during the revolutionary war, without any compensation whatever." 1 Henry St. George Tucker, *Blackstone's Commentaries* app. at 305-06 (1803). As early as 1778, John Jay, later first Chief Justice of the United States, wrote an essay decrying the practice by military quartermasters in New York of impressing "horses, teems [sic], and carriages" without the protections of the law. John Jay, A Freeholder, *A Hint to the Legislature of New York* (1778), *reprinted in* 5 *The Founders Constitution* 312, 312-13 (Philip B. Kurland & Ralph Lerner eds., 1987). Yale law professor Jed Rubenfeld has written that the "founding generation" enacted the Takings Clause in large part because of their concern with "the appropriation of private property to supply the army during the Revolutionary War." Jed Rubenfeld, *Usings*, 102 Yale L.J. 1077, 1122 (1993). Early

commentators concurred. *See* John Lewis, *A Treatise on the Law of Eminent Domain in the United States* § 53 (2d ed. 1900) ("In regard to personal property, no question can ordinarily arise. It is seldom necessary to appropriate it, but if appropriated, it is *taken*[.]"); Thomas M. Cooley, *General Principles of Constitutional Law in the United States of America* 336 (1880) ("The property which the Constitution protects is anything of value which the law recognizes as such[.]").[8]

Indeed, protection of personalty — and especially of farmers' crops — has been a central concern of takings jurisprudence since the Magna Carta. One provision of that fountainhead of Anglo-American constitutionalism provided that "[n]o constable or other of Our bailiffs shall take corn or other chattels of any man without immediate payment, unless the seller voluntarily consents to postponement of payment." Magna Carta, ch. 28 (1215), *reprinted in* A.E. Dick Howard, *Magna Carta: Text and Commentary* (1964). In the colonial era, Section 8 of the Massachusetts Body of Liberties (1641) protected personal property *alone* from uncompensated

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[8] Since the federal government did not assert the power of eminent domain within the States until 1864, *see* William Baude, *Rethinking the Federal Eminent Domain Power*, 122 Yale L.J. 1738, 1741, 1784 (2013) (citing *Kohl v. United States*, 91 U.S. 367 (1875)), the principal applications of the Fifth Amendment for much of its first century were in cases of impressments of personal property and exercises of eminent domain with respect to land in the federal district and the territories. In the territories, there were few occasions for the exercise of eminent domain because the federal government already owned much of the land and rarely needed to take it from private owners.

takings. *See* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 785 (1995). The Ninth Circuit's notion that personal property enjoys "less protection" than realty from uncompensated appropriations and invasions (Pet.App. 18a) has it backwards.

The very language of the Takings Clause should suffice to condemn the Ninth Circuit's interpretation. Few questions of semantic meaning are unequivocal, but this one is. Doctor Johnson's esteemed dictionary defined property, most relevantly, as "[r]ight of possession," "[p]ossession held in one's own right," and "[t]he *thing* possessed." 2 Samuel Johnson, *Dictionary of the English Language* (6th ed. 1785) (emphasis added). Noah Webster defined property as "[a]n estate, *whether in lands, goods or money*," and even included as examples of property "the productions of [one's] farm or ... shop[.]" Noah Webster, *American Dictionary of the English Language* (1828) (emphasis added). Shortly after the adoption of the Bill of Rights, James Madison wrote that "a man's land, or merchandize, or money is called his property," and is entitled to various protection including that "none shall be taken directly even for public use without indemnification to the owner." James Madison, *Property* (1792), *reprinted in* 14 *The Papers of James Madison* 266-68 (R. Rutland ed., 1977) (emphasis omitted).

It is also significant that where the term "property" appears elsewhere in the Constitution — such as the Property Clause and the Due Process Clauses of the Fifth and Fourteenth Amendments — it unquestionably includes personal and real

property equally. *See* U.S. Const. art. 4, § 3, cl. 2; U.S. Const. amends. V, XIV; *see also Fuentes v. Shevin*, 407 U.S. 67, 84 (1972). There is simply no support in public meaning or technical legal usage for the notion that personal property is inferior in status or degree of protection to real property.

3. The panel's rationale misconstrues *Loretto* and *Lucas*.

The panel did not engage in any analysis of the underlying history or logic of the Takings Clause, but rested its idiosyncratic interpretation entirely on distinctions between this case and *Loretto* and *Lucas*. Pet.App. 20a. The most basic flaw in that approach is that *Loretto* and *Lucas* — however important — are not necessary for cases where, as here, the government seizes a possessory interest in the disputed property. Long before *Loretto*, the compelled transfer of a possessory interest in private property to the government was recognized as a Fifth Amendment taking. To establish that per se takings jurisprudence does not apply to personalty, the panel would have had to deal with *Russell*, *Palmer*, *General Motors*, *Webb's Fabulous Pharmacies*, and other cases of that ilk — and not merely *Loretto* and *Lucas*.

Although *Loretto* happened to involve real property, neither its holding nor its reasoning was so limited. As the D.C. Circuit explained in *Nixon*, "the actual holding of *Loretto* makes no mention of a distinction between real and personal property, nor was any rationale given in the opinion that might justify such a distinction." 978 F.2d at 1284. According to the court below, *Loretto*'s citation of

"[t]he placement of a fixed structure on land or real property" as an "example" of a per se taking demonstrates that the case has a "narrow reach" that does not "extend" to personal property. Pet.App. 20a (emphasis omitted). But it can hardly be that when this Court illustrates its holding with an example, it impliedly excludes other possible examples.[9]

What the *Loretto* Court actually *said* was that "when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred." 458 U.S. at 426. In portions of its opinion ignored by the panel below, the Court left no question that governmental confiscation of personal property is a classical taking as well. Quoting one scholar who had "accurately summarized the case law concerning the role of the concept of physical invasions in the development of takings jurisprudence," the Court agreed that "'one incontestable case for compensation ... seems to occur when the government deliberately brings it about that its agents, or the public at large, 'regularly' use, or 'permanently' occupy, space *or a thing* which theretofore was understood to be under private ownership.'" *Id.* at 427 n.5 (emphasis added) (quoting Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of*

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[9] The panel also cited *Washington Legal Foundation v. Legal Foundation of Washington*, 271 F.3d 835, 854 (9th Cir. 2001) (en banc), for the proposition that "[t]he per se analysis has not typically been employed outside the context of real property," Pet.App. 20a, overlooking that this Court, in reviewing the Ninth Circuit's decision in that case, stated that a per se analysis was appropriate for money, which is a form of personal property. *Brown*, 538 U.S. at 235.

"Just Compensation" Law, 80 Harv. L. Rev. 1165, 1184 (1967)).

The panel attempted to distinguish *Loretto* in various ways, none of them even passably convincing. One was that most (though not all) of the *Loretto* Court's precedents involved real property. Pet.App. 20a; *but see Loretto*, 458 U.S. at 435 (citing *General Motors*, 323 U.S. 373). True, but irrelevant; many per se takings cases before and since *Loretto* involved personal property. *See supra* at 32-35. Nor does it matter that the *Loretto* Court also pointed out that physical occupations are subject to "relatively few problems of proof." Pet.App. 20a (quoting *Loretto*, 458 U.S. at 437). An appropriation of personal property is not subject to serious factual disputes either. *See* Lewis, *Eminent Domain* § 53 ("In regard to personal property, no question can ordinarily arise."). This Court has found effective government possession of property where proof is much harder. *E.g.*, *United States v. Causby*, 328 U.S. 256 (1946) (per se taking caused by airplane overflights). Assuredly, it can be tricky to determine whether a physical intrusion — a form of trespass — assumes the "extreme form" of a "permanent occupation" as in *Loretto*. But where the government takes *possession* of a piece of property, as here, the taking is obvious.

The panel's reliance on *Lucas* to interpret *Loretto* reflects its confusion between the separate categories of physical and regulatory takings. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005). *Lucas*, in contrast to this case, involved a restriction on the owner's permissible use of property — not a transfer of possession or use to the government itself. Its signal contribution to this Court's takings

jurisprudence was to make clear that a per se taking occurs not only in cases of "physical invasion," but *also* "where regulation denies all economically beneficial or productive use of land" — in other words, that certain land-use regulations are treated *like* physical invasions. 505 U.S. at 1016.

That is irrelevant to this case, because it is "inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' *and vice versa*." *Tahoe-Sierra*, 535 U.S. at 323-24 (emphasis added).[10] *Lucas* is thus beside the point where the government takes "possessory and dispositional control" of property. Pet.App. 25a-26a. By applying regulatory takings law to limit *Loretto* to real property, the panel did exactly what this Court said it must not do.

B. The Fifth Amendment Does Not Allow The Government To Avoid Its Categorical Duty By Pointing To Speculative Benefits.

The panel's second rationale for treating the Raisin Marketing Order as subject only to a balancing test is that "the Hornes did not lose all economically valuable use of their personal property," because they "retain the right to the proceeds from [its] sale." Pet.App. 20a-21a. The undisputed fact that the "right to the proceeds" often amounts to *nothing* (as in 2003-04) did not dissuade

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[10] The courts of appeals have concurred. *R & J Holding Co. v. Redevelopment Auth. of the Cnty. of Montgomery*, 670 F.3d 420, 431 (3d Cir. 2011); *Otay Mesa Prop., L.P. v. United States*, 670 F.3d 1358, 1365 & n.6 (Fed. Cir. 2012).

the panel: "[E]ven in years in which producers receive no equitable distribution of the RAC's net profits," it said, "the reserve raisins continue to work for the Horne's benefit" because they "fund[] the administration of a an industry committee tasked with (1) representing raisin producers, such as the Hornes, and (2) implementing the reserve requirement, the effect of which is to stabilize the field price of raisins." Pet.App. 21a-22a. This rationale has two related flaws. It confuses the rule for actual physical takings, like this, with the rule for regulatory takings. And it suggests that the possibility of speculative and unsubstantiated benefits can obviate the constitutional requirement of just compensation for a taking of property.

The panel's reasoning presupposes that a seizure — apparently even of real property — can be a per se taking *only* if it deprives the owner of "*all* rights associated with the [property]." Pet.App. 21a-22a (emphasis added). The question whether a purported taking deprives the owner of all the property's valuable uses arises, however, only in the context of *regulatory* takings, where the property owner retains possession: When a regulatory taking effects a total deprivation of value, it is treated *as if* the government had actually taken possession of the property. *See Lucas*, 505 U.S. at 1016. But that has no bearing on how a court should treat a taking of *actual* "possessory and dispositional control," as the panel acknowledged happened here. Pet.App. 25a-26a.

On the contrary, as this Court has explained, in cases where the government takes possession of property a court "*do[es] not ask* whether [the seizure]

deprives the owner of all economically valuable use[.]" *See Tahoe-Sierra*, 535 U.S. at 323 (emphasis added). If the government takes possession and control of one acre of a hundred-acre farm to build a post office, the fact that the property owner still has 99 acres left does not mean that no physical taking occurred, and certainly does not relieve the government of its categorical obligation to pay just compensation for what it has taken. By the same token, if it takes raisins (or their monetary equivalent) it has to pay for what it has taken, even if some economically valuable property interests are left.

Loretto underlines the point. There, when the government required apartment-building owners to permit installation of cable boxes, 458 U.S. at 422, the specific property taken — rectangular areas of a building's exterior about the size of a breadbox — retained the obvious economically valuable use of sealing the building from the elements. Yet that made no difference to the Court's holding that the physical occupation was a categorical taking requiring compensation. *Id.* at 438 & n.16; *see also Kaiser Aetna*, 444 U.S. at 179-80 (requiring private marina to admit the public is a categorical taking even though the marina continued to have economic value).

As with its arbitrary exclusion of personal property from the realm of per se takings, the Ninth Circuit stands alone in holding that takings of "possessory and dispositional control" do not categorically require compensation unless they deprive the owner of all economically valuable use. Pet.App. 25a-26a. The Federal Circuit, for example,

has explained that even when the government "only partially impair[s]" ownership and possession of property, "in the physical taking jurisprudence *any* impairment is sufficient." *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1292 (Fed. Cir. 2008) (emphasis added). The Eleventh Circuit held in *Gulf Power Co. v. United States* that a requirement that electrical utilities allow telecommunications carriers access to their physical networks constitutes a physical taking, even though the networks retained economic value. 187 F.3d 1324, 1328 (11th Cir. 1999). When there has been an actual physical taking, it does not matter whether the property retains some economically valuable use; the government must pay for what it takes.

The second flaw in this rationale is the panel's assumption that the mere possibility of benefits — even if wholly speculative and unsupported on the record — obviates the constitutional necessity of compensation. Benefits to a property owner from a physical taking can bear on the just compensation that must be paid, but it has no bearing on whether a physical taking has taken place.

State and federal courts have developed a narrow doctrine under which proven "special benefits" accruing to the property owner may be deducted from what would otherwise be just compensation. *See, e.g., Blanchette v. Connecticut Gen. Ins. Corps.*, 419 U.S. 102, 150-51 (1974); *Bauman v. Ross*, 167 U.S. 548, 584 (1897); 8A Nichols on Eminent Domain § 8A.02. When the property owner benefits personally, those special benefits might be credited against the compensation due, but it does not mean there is not a categorical taking. *See, e.g., Village of*

Norwood, 172 U.S. at 279; *see also Tahoe-Sierra*, 535 U.S. at 303 (existence of a regulatory taking is a "different and prior question" separate from compensation).

It is well established, meanwhile, that generalized public benefits that result from a taking have no bearing on *either* the right to or quantum of just compensation. As this Court said in *Monongahela Navigation Co. v. United States*, the Takings Clause "excludes the taking into account as an element in the compensation any supposed benefit that the owner may receive in common with all from the public uses to which his private property is appropriated[.]" 148 U.S. 312, 326 (1893). In *Armstrong*, the Court reiterated that "[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." 364 U.S. at 49. It is possible that the Raisin Marketing Order benefits *someone* — not consumers, surely, and not small independent farmers, but perhaps larger handlers engaged in the export trade, beneficiaries of donations of raisins to school lunch programs, and the like — but the Hornes must not be saddled with the cost of those social gains. The court below confused general social benefits and implicit in-kind compensation with whether compensation is required in the first place.

Even to be credited against the amount of compensation, special benefits must be *proved*. *See Bassett, New Mexico*, 55 Fed. Cl. at 75-76. We have no quarrel with the proposition that any payments

made to producers from the proceeds of sale of reserve raisins should be credited.[11] But the Ninth's Circuit's claim that the Hornes benefitted from being "represent[ed]" by the RAC and from implementation of the raisin reserve (Pet.App. 21a), is supported by nothing in the record. The government should not be permitted to avoid compensation for physical takings of property by vague and highly disputable references to the program's ostensibly beneficent purposes — as if there were no such things as special interest legislation, agency capture, and faction.

Equally problematic is the Ninth Circuit's claim that "the Horne's rights with respect to the reserved raisins are not extinguished because the Hornes retain the right to the proceeds from their sale," even though "the equitable distribution may be zero." *Id.* If affirmed by this Court, this holding would enable the government to take valuable property of any variety, sell it, use the proceeds for governmental purposes (including subsidies to other people), and pay the owners little or nothing — on the theory that the owner retains an "equitable stake" in whatever proceeds might be left. This allows the government to escape from its categorical duty to pay *just* compensation by holding out the possibility (and not even the guarantee) of *inadequate* compensation. That bears no resemblance to the dictates of the Fifth Amendment.

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[11] The ALJ and JO orders did not credit the Hornes with their share of the proceeds from the 2002-03 raisin crop, so in fact they received no benefit.

C. The Fifth Amendment Does Not Permit Confiscations Of Private Property To Be Recast As Permissible Use Restrictions.

Finally, the panel concluded that "the most faithful way to apply the Supreme Court's precedents to the Hornes' claim" is "to hold that the reserve requirement constitutes a use restriction on the Hornes' personal property and then analogize that use restriction to the land use permitting context." Pet.App. 23a. The court reasoned that "the reserve requirement is a use restriction applying to the Hornes insofar as they voluntarily choose to send their raisins into the stream of interstate commerce. The Secretary did not authorize a forced seizure of the Horne's crops, but rather imposed a condition on the Hornes' *use* of their crops by regulating their sale." Pet.App. 25a (emphasis in original). Applying a "'nexus and rough proportionality'" test, Pet.App. 22a-23a, which this Court developed in the "special context" of land-use permitting, *see Lingle*, 544 U.S. at 538; *Koontz*, 133 S. Ct at 2591, the panel determined that the Raisin Marketing Order does not effect a taking at all, Pet.App. 29a.[12] That analysis contradicts the law of this Court.

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[12] The panel asserted that the government "urge[d]" that approach. Pet.App. 23a. That is not so. On the contrary, the government argued at length in its Ninth Circuit supplemental brief that the land-use permitting test does *not* apply. *See* U.S. Supp. Br. at 8, *Horne v. USDA*, No. 10-15270 (9th Cir. Aug. 13, 2013) ("[T]he marketing order is not a land-use permit application process."); *id.* at 8-12 (discussing the land use exaction analysis in *Koontz*). The government only suggested in the alternative, in a single paragraph, that the test would be satisfied *if it did* apply. *Id.* at 12.

Time and again, this Court has rejected the panel's premise that what would be a physical taking of property if done directly — a "forced seizure," in the panel's words, Pet.App. 25a — becomes a mere use restriction if the taking is imposed as "a condition on the Hornes' use" of their raisins in commerce. *Id.* This Court addressed a similar argument in *Loretto*, where the appellee companies claimed that installation of facilities on private property was "simply a permissible regulation of the use of real property." 458 U.S. at 438-39. Justice Marshall flatly dismissed that assertion:

> It is true that the landlord could avoid the requirements of § 828 by ceasing to rent the building to tenants. But a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation. Teleprompter's broad "use-dependency" argument proves too much. For example, it would allow the government to require a landlord to devote a substantial portion of his building to vending and washing machines, with all profits to be retained by the owners of these services and with no compensation for the deprivation of space. It would even allow the government to requisition a certain number of apartments as permanent government offices. The right of a property owner to exclude a stranger's physical occupation of his land cannot be so easily manipulated.

Id. at 439 n.17. As the Court observed in *Nollan*, to say that such an appropriation of property is "'a mere restriction on its use' is to use words in a manner that deprives them of all their ordinary meaning." 483 U.S. at 831 (citation omitted); *see also Dolan*, 512 U.S. at 385; *Koontz*, 133 S. Ct. at 2594-95, 2598-99.

Indeed, the Court explicitly rejected the panel's premise as early as *Union Pacific Railroad Co. v. Public Service Commission of Missouri*, 248 U.S. 67 (1918) (Holmes, J.). In that case, the state supreme court justified what would ordinarily have been an unconstitutional exaction on the ground it was imposed as a condition on a permit that the company "voluntar[ily]" chose to obtain. *Id.* at 70. The Court responded that "it always would be possible for a State to impose an unconstitutional burden by the threat of penalties worse than it in case of a failure to accept it, and then to declare the acceptance voluntary." *Id.* Here, USDA demanded the transfer of reserve-tonnage raisins as a condition to permitting sale of the rest. True, it would be "worse" for the Hornes not to be able to sell raisins at all, but it was error for the Ninth Circuit to regard this exaction as a product of "voluntary choice."

Following this Court's lead, the Eleventh and Federal Circuits have refused to treat seizures of physical possession as use restrictions. In *Gulf Power*, the Eleventh Circuit addressed a government requirement that utility companies provide telecommunications carriers and cable companies with access to their property. In holding that the requirement was a physical taking like the one in *Loretto*, the Eleventh Circuit rejected the argument

that the mandatory-access provision is a permissible "regulatory condition" of use that the electric utilities could "avoid ... by refraining from using their poles, ducts, conduits, and rights-of-way for wire communications." 187 F.3d at 1331. As the court explained, that argument was "foreclosed by *Loretto*," which holds that "[t]he protection against a permanent, physical occupation of one's property does not hinge on the choice of use for that property." *Id.*

The Federal Circuit rejected the same argument in *Casitas Municipal Water District*. There, the government required a water-control project to physically and permanently divert some of the water it had beneficial use of so that the government could operate a "fish ladder" to preserve an endangered species. Concluding that this was a physical taking automatically requiring just compensation, the court rejected the government's argument that its requirement "was merely a use restriction on a natural resource, and therefore governed by the regulatory taking jurisprudence." 543 F.3d at 1293. The "restriction of use cases cited by the government" were simply inapplicable because "this case involves physical appropriation by the government." *Id.* at 1294. Like the raisin growers' confiscated raisins, "[t]he water, and [the owner's] right to use that water, is forever gone." *Id.* at 1296.

The nature of a taking depends on what kind of property interest is invaded — whether a possessory interest, as here; the right to exclude, as in *Loretto* or *Kaiser Aetna*; or the right to beneficial economic use, as in *Lucas*. It does not depend on the mechanism by which the taking is enforced — whether compulsory

seizure, trespassory invasion, fine or other punishment, or denial of the right to engage in commerce. In particular, the taking of a possessory interest in private property is not transmuted into a "use restriction" because the Hornes wished to use it in commerce. *Koontz*, 133 S. Ct. at 2594-95, 2598-99; *Loretto*, 458 U.S. at 439 n.17; *Union Pac.*, 248 U.S. at 70. As explained above, it may well be that if the USDA merely limited the amount of a crop that a farmer can sell, that would be a use restriction. But the Raisin Marketing Order is not of this description. *See Evans*, 74 Fed. Cl. at 558. The panel thus confused seizure of ownership of property, even when imposed as a condition on engaging in business, with a legitimate regulatory limitation on property use.

The panel justified equating this physical transfer of raisins with a use restriction by analogy to cases involving *regulatory* takings, *see Yee*, 503 U.S. at 524-25 (rent control ordinance), or conditions on a government benefit, *see Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1006 (1984) (requirement for surrender of trade secrets as part of pesticide registration application); *see also Nollan*, 483 U.S. at 833 n.2 (distinguishing *Ruckelshaus* as not involving a true use restriction). That yet again collapses this Court's longstanding distinction between regulatory and physical takings. *See supra* at 43-44.

Far from supporting the panel, *Yee* in fact reaffirmed *Loretto*, citing the *very language* that squarely contradicts the panel's holding. *See* 503 U.S. at 531-32 (quoting *Loretto*'s footnote 17 with approval). As *Yee* explained, "[h]ad the city required such [a physical] occupation, of course, petitioners would have a right to compensation, and the city

might then lack the power to condition petitioners' ability to run mobile home parks on their waiver of this right." *Id.* at 532. And *Yee* reaffirmed that the government's categorical duty of just compensation when it "actually takes title" to property is "distinct" from its duty to compensate when it "merely regulates the use of property." *Id.* at 522.

Instead of applying cases establishing that the government may not exact physical property without compensation under the guise of a "use restriction," the panel applied a different line of cases providing that "a unit of government may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a 'nexus' and 'rough proportionality' between the government's demand and the effects of the proposed land use." *Koontz*, 133 S. Ct. at 2591 (citing *Nollan* and *Dolan*). Under the panel's view, that test is the general rule governing "conditional exaction[s]" in return for a "government benefit," in cases which "involve choice" about the use of property. Pet.App. 25a-26a.

This Court has rejected the Ninth Circuit's argument. In reality, *Nollan* and *Dolan* represent an *exception* to the general rule that the government's demand for physical property must be analyzed as a per se taking, not a use restriction; that exception applies only in the "special context" of land-use permitting, *Lingle*, 544 U.S. at 538, and has never been "extended" beyond that context, *see City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999). What distinguishes land use permitting, as this Court has explained, is the government's wide discretion to grant or deny

permission for given property uses on a case-by-case basis; the infinite range of public costs that can result from particular uses; the potential of "dedications of property" for public use to "offset" those harms; and the great value of the permitting process to landowners. *Koontz*, 133 S. Ct. at 2594-95. Those factors create an unusual need for discretion in setting land use conditions, and a special risk that the government will use that discretion to extort property without compensation, effectively depriving property owners of their Fifth Amendment rights. The "nexus" and "rough proportionality" test of *Nollan* and *Dolan* applies the doctrine of unconstitutional conditions to cabin the government's discretion. *Id.*

The unique considerations of land use do not apply here. The Marketing Order does not confer a "benefit" at all. As the Court noted in *Nollan*, "the right to build on one's own property — even though its exercise can be subjected to legitimate permitting requirements — cannot remotely be described as a 'governmental benefit.'" 483 U.S. at 833 n.2. The Order does not establish a discretionary permitting regime, and there are no public harms from the sale of free-tonnage raisins that dedication of reserve-pool raisins for public use might offset. The question of whether to set a raisin reserve equally applicable to all raisin growers is thus different from the myriad considerations — aesthetic, environmental, social, political — involved in whether to issue a land use permit to a particular applicant with respect to a single parcel of land. Simply put, a land use permitting board's need for discretion to demand easements on property is different in kind from the RAC's largely mechanical decision whether to seize

raisins. In the absence of those considerations, the special rule of *Nollan* and *Dolan* does not apply, but rather the general exactions rule established in cases such as *Loretto*.

Even if *Nollan* and *Dolan* did apply to a regulation such as the Raisin Marketing Order, the "nexus" and "rough proportionality" test they stand for could not be met. In those cases, the permitted land use inflicted an injury on the public; this Court held that a permit could be conditioned on transfer of a property right to the government, but that any such relinquishment must be limited to property interests that mitigate or cure that precise injury. *See Dolan*, 512 U.S. at 387-88. Here, the production and sale of raisins inflicts no injury on the public (but only greater competition), and thus there is no need for the public to get free raisins as an offset.

Even if we imagine that the sale of raisins inflicts a kind of "injury" on other growers by creating competitive price pressure, seizure of the reserve raisins has no connection whatever to the government's desire to "stabilize" raisin prices. A limitation on the quantity of raisins to be sold might have a nexus to that interest, but the crucial additional step of transferring ownership of raisins to the government — especially when the government uses those raisins itself or sells them back into the market for the purpose of subsidizing other players in the industry — does not.

By the same token, seizure of raisins as opposed to volume controls or other regulations is not "proportional" to any public need. Indeed, the issue here is almost identical to that in *Dolan*. In that case, a landowner applied for a permit to pave a

parking lot in a flood zone. The municipality attached a condition: that she dedicate a portion of her property to the public as a public greenway. This Court held that the demand was not proportional to the problem of flood control because a private greenway could have served the same purpose without eliminating the property owner's right to exclude. 512 U.S. at 393. The same analysis applies here. The government may have authority to tell raisin growers not to sell their whole crop, but requiring them to transfer possession of raisins to the RAC is not proportional to that purpose.

The panel sought to downplay the practical impact of its holding by noting that the Hornes "can avoid the reserve requirement of the Marketing Order by ... planting different crops, including other types of raisins, not subject to this Marketing Order or selling their grapes without drying them into raisins." Pet.App. 25a-26a. That is of no significance; the property owner in *Loretto* could have avoided the taking "by ceasing to rent the building to tenants," 458 U.S. at 439 n.17, and the owner of the pond in *Kaiser Aetna* could have avoided imposition of a navigational servitude by not connecting the pond to interstate waters, 444 U.S. at 165-66.

Under the Ninth Circuit's theory, the government can extract whatever property concessions it wants by effecting takings as a condition on the "government benefit" of not being forbidden to do anything the government has power to forbid. Pet.App. 26a. There would be no end of circumstances where the government could deprive property owners of "possessory and dispositional control," under this theory, Pet.App. 23a n.18, 25a-

26a, subject only to analysis applicable to use restrictions rather than a categorical compensation requirement. *See, e.g.*, *Loretto*, 458 U.S. at 439 n.17 (rejecting the defendant's argument in part because "[i]t would even allow the government to requisition a certain number of apartments as permanent government offices").

The panel's decision ultimately stands for the proposition that the government can take farmers' property as a condition of its grace in allowing them to sell part of their crop. Not since the barons prevailed at Runnymede has that been the law.

* * *

In the typical Takings Clause case where the lower court holds that there is no need for compensation because there was no taking, and this Court reverses, the case is remanded to determine the amount of just compensation due. No such remand is required here. Because Petitioners invoked the Takings Clause as a defense to a USDA order, as is permitted under the AMAA, *see Horne I*, 133 S. Ct. at 2063, no further proceedings are necessary except to hold that the dollar equivalent and penalty portions of the USDA order were unlawful. *See supra* at 12-13.

CONCLUSION

For the foregoing reasons, the Court should reverse the court of appeals and remand with instructions to remand to USDA to vacate fines imposed for noncompliance with the requirement to transfer reserve-tonnage raisins to the RAC.

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March 2, 2015

Supreme Court, U.S.
FILED
APR 1 - 2015
OFFICE OF THE CLERK

No. 14-275

In the Supreme Court of the United States

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BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the Secretary of Agriculture's marketing order stabilizing the market for California raisins—under which a percentage of the raisins that a producer offers for sale may be required to be sold in a manner directed by the Secretary, with the producer retaining equitable rights in the proceeds—effects a per se taking under the Just Compensation Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 750 F.3d 1128. The opinion of the district court (Pet. App. 125a-189a) is not published in the *Federal Supplement* but is available at 2009 WL 4895362. The decision of the judicial officer of the United States Department of Agriculture (USDA or Department) (Pet. App. 56a-100a) is reported at 67 Agric. Dec. 18. The decision of the USDA administrative law judge (Pet. App. 30a-55a) is reported at 65 Agric. Dec. 805.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 2014. On July 16, 2014, Justice Kennedy extended the time for filing a petition for a writ of certiorari to and including September 8, 2014, and the

petition was filed on that date. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Pertinent constitutional, statutory, and regulatory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-31a.

STATEMENT

1. The Agricultural Marketing Agreement Act of 1937 (AMAA), ch. 296, 50 Stat. 246, was enacted during the Great Depression "in response to plummeting commodity prices, market disequilibrium, and the accompanying threat to the nation's credit system." Pet. App. 193a; see 7 U.S.C. 601. Sales of raisins during that time reflected the "market upheaval" that "pervaded the entire agricultural industry." Pet. App. 4a; see *Zuber* v. *Allen*, 396 U.S. 168, 174 (1969) (observing that "utter chaos ensued" from "[t]he drop in commodity prices"). Between 1914 and 1920, raisin prices "rose rapidly," peaking at $235 per ton in 1921. Pet. App. 4a. The "surge in prices" prompted an increase in production, which "caused prices to plummet back down to between $40 and $60 per ton." *Ibid.* Many raisin producers were thereafter "compelled to sell at less than parity prices" and even for "less than the cost of production." *Parker* v. *Brown*, 317 U.S. 341, 363-364 (1943).

Congress enacted the AMAA to respond to the market disequilibrium by "rais[ing] the price of agricultural products" and "establish[ing] an orderly system for marketing them." *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 346 (1984); see 7 U.S.C. 602 (declaration of policy). To achieve those goals, the AMAA authorizes the Secretary of Agriculture to

promulgate "marketing orders" that regulate the sale of commodities that are vulnerable to market fluctuations. 7 U.S.C. 608c. The marketing orders create a "cooperative venture" among the Secretary, the "producers" who grow the agricultural commodity, and the "handlers" who process the commodities for marketing. *Block*, 467 U.S. at 346.

To achieve the AMAA's objectives, the Secretary may choose among market-regulation tools, such as limiting the total quantity of a commodity that can be marketed, 7 U.S.C. 608c(6)(A), or, as relevant here, establishing "reserve pools" of the commodity, 7 U.S.C. 608c(6)(E). If a reserve pool is established, the Secretary must preserve producers' "beneficial[] interest[]" in the net proceeds from sales of the reserve commodity. *Ibid.*

In general, a marketing order does not become effective unless approved by two-thirds of producers (by number or volume of production). 7 U.S.C. 608c(8)(B) and (9). The order generally must also be approved by at least 50% (by volume) of handlers. 7 U.S.C. 608c(9). Similarly, the Secretary must terminate any marketing order when termination is favored by more than 50% (by volume) of producers. 7 U.S.C. 608c(16)(B); 7 C.F.R. 989.91(c).

2. This case concerns the marketing order that regulates the sale of California raisins. See 7 C.F.R. Pt. 989. The California raisin industry accounts for 99.5% of the domestic supply, and 40% of the world's supply, of raisins. Pet. App. 196a n.7.

The raisin industry is particularly vulnerable to "supply fluctuations [that] can result in producer price instability and disorderly market conditions." 68 Fed. Reg. 41,689 (2003). Supply can vary dramatically from

year to year due to several factors, including the number of "plantings made in earlier years" and "variable weather patterns" that affect the sun-drying method of producing raisins. *Ibid.*; see 64 Fed. Reg. 43,897, 43,898 (1999) (explaining that 1998-1999 crop was "much smaller than average" because of "the weather phenomenon known as El Nino, scattered rain during the fall harvest, and a shortage of labor"). For example, growers produced 240,000 tons of natural seedless raisins in the 1998-1999 crop year, then produced more than 430,000 tons two years later in the 2000-2001 crop year. 71 Fed. Reg. 29,569 (2006).

Moreover, "[r]aisin-variety grapes are the most versatile" of California grapes; in addition to being dried into raisins, they can be sold "as fresh grapes" or crushed into "juice in the production of wine or juice concentrate." 68 Fed. Reg. at 41,689. "Annual fluctuations in the fresh grape, wine, and concentrate markets" accordingly introduce additional "variability into the raisin market" because producers may choose to sell their grape crop for those other uses. See 64 Fed. Reg. at 43,898 (observing that the 1999-2000 crop could be short due in part to "anticipated high demand for raisin-variety grapes from wineries this fall"). The versatility of raisin-variety grapes thus "makes the marketing of raisins a more difficult task." 68 Fed. Reg. at 41,689.

While raisin supply can vary substantially from year to year, the domestic demand for raisins remains relatively stable, averaging approximately 211,000 tons per year. See Raisin Admin. Comm., *Marketing Policy & Industry Statistics 2014*, at 4 (Oct. 2, 2014) (*2014 RAC Report*), http://raisins.org/images/marketing%20policy%202014a.pdf. In an unregulated mar-

ket, annual supply fluctuations combined with static domestic demand creates price instability—which is precisely what occurred in the raisin industry prior to the AMAA's enactment. See Pet. App. 4a.

3. In 1949, upon the vote of the raisin industry, the Secretary issued the raisin marketing order, which sought to stabilize producer returns and create an orderly commercial market. See Pet. App. 46a. Because domestic demand for raisins is inelastic, "[i]f raisin markets are over-supplied with product, producer prices will decline." 69 Fed. Reg. 50,292 (2004). The order prevents that consequence by, under certain circumstances, controlling supply through "reserve pools" of raisins that will not be released immediately into the domestic market. See 7 U.S.C. 608c(6)(E); 7 C.F.R. 989.54(d), 989.65. The reserve pools thus increase the price producers obtain from the sale of the rest of their crop. See Ben C. French & Carole Frank Nuckton, *An Empirical Analysis of Economic Performance Under the Marketing Order for Raisins*, Am. J. Agric. Econ. 581, 592 (1991) (analyzing data collected over 22 years to conclude that "grower net returns * * * were higher under the marketing order" in the vast majority of scenarios); Pet. App. 177a ("[T]he primary focus of the market control program is to maximize return to the grower.") (citation omitted). The reserve pool also "keep[s] raisin supply relatively constant from year to year, smoothing the raisin supply curve and thus bringing predictability to the market for producers and consumers alike." Pet App. 2a.

The reserve program and other features of the marketing order are administered by the Raisin Administrative Committee (RAC). 7 C.F.R. 989.26,

989.35. The RAC consists of 47 members appointed by the Secretary, of whom 35 represent producers, 10 represent handlers, one represents a cooperative bargaining association of growers, and one represents the public. 7 C.F.R. 989.26. Producers and handlers nominate their representatives to the RAC, who serve without compensation. 7 C.F.R. 989.26, 989.29, 989.30, 989.39.

Every year, the RAC computes a trade demand and reviews the crop yield and raisin inventories. 7 C.F.R. 989.54(a) and (e). Based on that calculation of expected supply and demand, the RAC determines whether to recommend reserve pools for any of the eight varietal types of raisins. 7 C.F.R. 989.54. The RAC generally "release[s] the full trade demand" for sale on the open market, 7 C.F.R. 989.54(d), and establishes a reserve pool only "in years when the supply exceeds the trade demand by a large enough margin that the [RAC] believes volume regulation is necessary to maintain market stability." 71 Fed. Reg. at 29,570. The reserve regulations apply only to raisins prepared for market, so they do not affect raisins grown for producers' own personal use or consumption. See 7 C.F.R. 989.15, 989.66.

Because the raisin supply fluctuates, the reserve requirement varies from year to year. In some years—including the five most recent crop years—there is no reserve requirement at all. See *2014 RAC Report* 2, 30. Other years have relatively low reserve requirements, such as the 10%, 15%, and 13% reserves in the 2006-2007, 2007-2008, and 2008-2009 crop years, respectively. *Id.* at 30.

The reserve requirement is implemented when handlers acquire raisins from producers to be pre-

pared for market. At that point the handlers divide the raisins into two groups: "free tonnage" and "reserve tonnage." 7 C.F.R. 989.65. The handlers pay producers for the free tonnage at market prices and may resell those raisins without restriction. *Ibid.* The remaining reserve-tonnage raisins cannot immediately be sold by handlers on the open market, and producers do not receive immediate payment for those raisins. See 7 C.F.R. 989.54(d), 989.65.

Handlers hold the reserve raisins "for the account of the [RAC]," 7 C.F.R. 989.66(a), and must store them separately from other raisins and "at all times" in the handlers' "possession or under [their] control." 7 C.F.R. 989.66(b)(2) and (c). A handler who does not comply with the reserve requirement "shall compensate the [RAC] for the amount of the loss resulting from" that failure, which is added "to the earnings of the applicable reserve pool." 7 C.F.R. 989.166(c).[1]

Under the marketing order, and in accordance with the AMAA, raisin producers retain the "beneficial[] interest[]" in reserve raisins and receive "the equitable distribution of the net return derived from the sale" of those raisins. 7 U.S.C. 608c(6)(E); see 7 C.F.R. 989.66(h) (providing for distribution of net proceeds to producers on pro rata basis). Raisin producers may assign their interest in reserve raisins to third parties. *Ibid.*

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[1] The marketing order imposes additional obligations on handlers, including, *inter alia*, requirements to pay assessments, file reports, and obtain inspections. See 7 C.F.R. 989.58(d), 989.59(d), 989.73, 989.77, 989.90. A handler who violates the order is subject to a civil penalty of up to $1100 per day of violation. 7 U.S.C. 608c(14)(B); 7 C.F.R. 3.91(b)(1)(vii).

The regulations authorize the RAC to direct the sale of reserve raisins in several ways, but specify that the raisins must in all instances "be sold to handlers at prices and in a manner intended to maxim[ize] producer returns and achieve maximum disposition of such raisins." 7 C.F.R. 989.67(d)(1). Reserve tonnage is sometimes sold, following an initial delay, as free tonnage that can enter the domestic market without restriction. 7 C.F.R. 989.54(g), 989.67(j). By temporarily restricting the sale of reserve raisins when production far exceeds domestic demand, and then releasing those raisins as free tonnage later, the RAC increases producer returns and stabilizes the year-to-year fluctuations in supply. See Pet. App. 5a. Reserve raisins also may be released as free tonnage through the raisin diversion program, which credits producers with raisins if they prune or remove vines to reduce supply. 7 C.F.R. 989.56, 989.156. The RAC additionally is authorized to sell reserve raisins to U.S. government agencies, foreign governments or foreign importers, to handlers for resale to exporters, and in other "outlets noncompetitive with those for free tonnage raisins." 7 C.F.R. 989.67(b).

The costs of administering the reserve program—including expenses associated with inspections, storage, and maintenance of reserve raisins, 7 C.F.R. 989.102-.115, 989.157-.159, 989.67(j), 989.82, 989.401—are deducted from the gross proceeds generated by sales of reserve raisins. The RAC also incurs expenses for market research, advertising, and promotion of the foreign market, including subsidies for export sales that bolster foreign demand for California raisins. 7 C.F.R. 989.53(a).

After deducting all expenses, the RAC distributes net reserve-pool proceeds to producers on a pro rata basis. 7 C.F.R. 989.53(a), 989.66(h). Historically, the sale of reserve raisins has resulted in tens of millions of dollars in net proceeds for producers. For example, producers earned more than $45 million in net proceeds from the sale of reserve raisins in 1997-1998; $58 million in 2000-2001; $35 million in 2001-2002; and $47 million in 2002-2003. See RAC, *Statement of Disposition and Grower Equity for 1997-98, 2000-01, 2001-02, and 2002-03 Natural Seedless Reserve Pool.* In other years, there are no net proceeds from the reserve pool to distribute to producers. This may occur when, for example, the size of the reserve balloons and raisins cannot sell at prices that produce net proceeds after program-related costs are deducted from gross receipts.

4. The raisin industry faced chronic over-supply leading up to the two crop years at issue in this case, 2002-2003 and 2003-2004. In 2000-2001, raisin production reached a record high of 432,616 tons—more than double the domestic demand. 68 Fed. Reg. at 41,689. The industry experienced high levels of inventory that could not be sold and so were carried over to the next year as surplus. *Ibid.* As a result, "[h]andlers compete[d] against each other in an attempt to sell more raisins to reduce inventories and to market their crop," which "put[] downward pressure on growers' prices and incomes." *Ibid.*

Production continued far above normal in 2001-2002 and 2002-2003, with deliveries of 377,328 tons and 388,010 tons, respectively. 69 Fed. Reg. at 50,292. "Three crop years of high production and a large" surplus inventory resulted in a "burdensome supply of

raisins." *Ibid.* After assessing those market conditions, the RAC recommended a reserve percentage of 47% for natural seedless raisins in 2002-2003 to "help stabilize raisin supplies and prices, and strengthen market conditions." 68 Fed. Reg. at 41,686. The Secretary conducted an economic analysis and concluded that prices would be "$142 per ton higher than under an unregulated scenario." *Id.* at 41,690. As the Secretary's final rule explained, "[t]his price increase [would be] beneficial to all producers regardless of size and [would] enhance[] producers' total revenues in comparison to no volume control." *Ibid.* The Secretary received no comments on the establishment of a reserve pool. *Id.* at 41,691.

Supply continued to far exceed demand in the 2003-2004 crop year. 69 Fed. Reg. at 50,291 (finding volume regulation warranted because the "total available supply of 425,970 tons" was "200 percent higher than the 211,493-ton trade demand"). The RAC accordingly recommended a reserve of 30% for natural seedless raisins. *Id.* at 50,289. The Secretary's "econometric model estimate[d] prices to be $63 per ton higher than under an unregulated scenario." *Id.* at 50,292. Once again, the Secretary received no comments on the establishment of a reserve pool. *Id.* at 50,293.

In the 2002-2003 crop year, producers received $272.73 per ton as their equitable share of the reserved natural seedless raisins, resulting in $47.9 million in net distributions to producers. See RAC, *Statement of Disposition and Grower Equity 2002-03 and 2003-04 Natural Seedless Reserve Pool.* No payments were made for the 2003-2004 crop year because no net proceeds remained after deducting program-related costs. See *ibid.*

5. Petitioners own and operate vineyards in California where, since 1969, they have grown grapes and produced raisins. Pet. App. 33a. For six years, petitioner Marvin D. Horne served as an alternate member of the RAC. *Id.* at 34a.

After operating as raisin producers for more than 30 years, petitioners devised a plan in an effort to exempt their raisins from any reserve requirement, granting them a competitive advantage as compared to producers who complied with that requirement. Pet. App. 32a-33a. Specifically, petitioners purchased equipment to prepare raisins for market and began conducting their own packing and handling operations. *Id.* at 36a. Petitioners adopted the view that if they packed and marketed their own raisins, they would not have to place any raisins in reserve. *Id.* at 7a. Petitioners also planned to pack raisins produced by other growers using a fee arrangement that they maintained would exclude them from the regulatory definition of a handler, eliminating their obligation to reserve other growers' raisins. *Ibid.*

Before petitioners commenced their operations, USDA repeatedly informed them that they would be handlers subject to the reserve requirement, with respect to both their own raisins and the raisins they packed for others. Pet. App. 35a-36a. USDA explained that any entity that "has or obtains physical possession of raisins at a packing or processing plant" falls within the regulatory definition of a handler. *Id.* at 35a. USDA further notified petitioners that "[m]ore than half of the recognized handlers * * * are also producers," yet comply with the reserve requirement. *Id.* at 159a (citation omitted).

Petitioners nevertheless decided to flout the marketing order by handling raisins without complying with the reserve requirement in 2002-2003 and 2003-2004. Pet. App. 36a. Petitioners' facilities processed more than three million pounds of raisins during that time, all of which were marketed at free-tonnage prices. *Id.* at 145a, 200a. While petitioners ignored the reserve requirement, in "express[] disregard[]" of USDA's guidance, *id.* at 36a, other producers and handlers complied with that requirement, giving petitioners an "unfair advantage by freeing them[] from regulations the rest of their industry observed as the best way for all raisin growers and handlers to realize optimum prices." *Id.* at 47a.

6. In 2004, the Administrator of the Agricultural Marketing Service (a division of USDA) initiated an enforcement proceeding against petitioners based on their violations of the marketing order during the 2002-2003 and 2003-2004 crop years. Pet. App. 133a-134a, 200a. In the administrative proceedings, petitioners admitted that they did not hold raisins in reserve and failed to comply with other regulatory obligations imposed on handlers. *Id.* at 36a-40a, 132a-133a.

An administrative law judge (ALJ) rejected petitioners' argument that they were not handlers subject to the marketing order's requirements. Pet. App. 46a-53a. The ALJ found that petitioners had committed 673 violations of the marketing order, including 592 violations (one per day) for failing to reserve raisins in 2002-2003 and 2003-2004. *Id.* at 43a-44a, 53a, 97a. The ALJ also found that petitioners "acted willfully and intentionally" when they declined to reserve raisins, *id.* at 51a, and that petitioners' "violations were

deliberate and were designed to obtain an unfair competitive advantage over" industry participants "who were in compliance with the Raisin Order," *id.* at 33a.

The ALJ's decision was affirmed in relevant part by a USDA judicial officer. Pet. App. 56a-98a; see *id.* at 101a-123a. Petitioners were ordered to pay approximately $8783 in unpaid assessments, $202,600 in civil penalties, and $483,844 for the raisins petitioners had failed to reserve. *Id.* at 8a n.6.

7. Petitioners sought judicial review in the District Court for the Eastern District of California. Pet. App. 138a; see 7 U.S.C. 608c(14)(B). The district court granted summary judgment in favor of the government. Pet. App. 126a, 189a. As relevant here, the court rejected petitioners' contention that the marketing order could not be enforced against them because it effected a physical taking of raisins in violation of the Fifth Amendment. *Id.* at 176a-187a. The court observed that "[t]he government does not physically invade [petitioners'] land to take the raisins, nor does the government take physical possession of the raisins," which instead remain "in the possession of the handlers." *Id.* at 186a. In addition, the court emphasized that petitioners "retain an equity interest in their reserve tonnage raisins." *Ibid.*

The court of appeals affirmed. Pet. App. 192a-219a. In its initial opinion, the court held that petitioners' takings claim lacked merit. *Id.* at 204a-214a. The court subsequently issued an amended opinion concluding that it lacked jurisdiction to address the takings claim. *Id.* at 221a-241a. The court explained that petitioners presented a takings defense "not in their capacity as handlers, but in their capacity as producers," because they alleged that the marketing

order "takes reserve-tonnage raisins belonging to producers, not property belonging to handlers." *Id.* at 235a. Because the Tucker Act, 28 U.S.C. 1491(a)(1), authorized producers to obtain compensation in the Court of Federal Claims (CFC) for any taking effected by the reserve requirement and petitioners had not availed themselves of that mechanism, the court held that their claim failed. Pet. App. 236a.

This Court reversed that jurisdictional holding. *Horne* v. *Department of Agriculture*, 133 S. Ct. 2053 (2013) (*Horne I*). The Court held that petitioners had raised their takings-based defense "only in their capacity as handlers." *Id.* at 2060. The Court further concluded that "the AMAA provides a comprehensive remedial scheme that withdraws Tucker Act jurisdiction over takings claims brought by raisin handlers," such that "[p]etitioners' taking claim * * * was properly before the court [of appeals]." *Id.* at 2056. However, the Court took "no position on the merits of petitioners' takings claim," *id.* at 2061 n.5, and further reserved judgment on whether a producer could "bring suit for just compensation in the Court of Claims" and "what impact the availability of such a claim would have on petitioners' takings-based defense," *id.* at 2062 n.7. See *ibid.* (explaining that whether a producer may seek compensation is a "question[] going to the merits of petitioners' defense, not to a court's jurisdiction to entertain it").

8. On remand, the court of appeals rejected petitioners' takings claim on the merits. Pet. App. 12a-29a. The court first observed that the relevant property alleged to have been taken was the reserve raisins themselves. *Id.* at 12a-15a. Although petitioners had "declined to comply with the reserve require-

ment" and so had not actually "physically convey[ed] raisins to the RAC," they contended that the Secretary could not lawfully fine them for failing to hold raisins in reserve if that requirement would have effected an uncompensated taking of producers' raisins. *Id.* at 12a-13a. The court agreed with petitioners that "the constitutionality of the penalty rises or falls with the constitutionality of the Marketing Order's reserve requirement." *Id.* at 13a.

The court of appeals next noted that petitioners had "intentionally declined to pursue a" regulatory takings claim under *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104 (1978), instead arguing only that the marketing order "works a categorical taking." Pet. App. 16a. The court recognized that this Court's decision in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)—which involved a law requiring a landlord to "permit a cable television company to install its cable facilities upon his property," *id.* at 421—"holds that permanent physical invasions of real property work a per se taking." Pet. App. 17a. But the court concluded that *Loretto* was not controlling for "[t]wo independent reasons." *Ibid.* First, the court found it significant that the marketing order operates against personal property, rather than real property. *Id.* at 18a. The court explained that "this distinction does not mean the Takings Clause is inapplicable," but that "the government's authority to regulate * * * is at its apex where, as here, the relevant governmental program operates against personal property and is motivated by economic, or 'commercial,' concerns." *Id.* at 18a-19a.

Second, the court of appeals observed that *Loretto* applies only when a regulation fully extinguishes an

owner's rights in the particular property at issue. Pet. App. 20a-21a. Because the marketing order preserves producers' ownership of "the right to the proceeds from the[] sale" of reserve raisins, the court found a per se analysis unwarranted. *Id.* at 21a-22a.

Instead, the court of appeals applied a test drawn from this Court's decisions in *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994), which evaluated the constitutionality of conditions on land-use permits. Pet. App. 23a-28a. The court believed that framework supplied the appropriate analysis in this case because the Secretary "did not authorize a forced seizure of [petitioners'] crops," but rather effectively imposed a "use restriction applying to [petitioners] insofar as they voluntarily choose to send their raisins into the stream of interstate commerce." *Id.* at 25a; see *id.* at 25a-26a (observing that the reserve-pool requirement, like land-use-permit conditions, involves "a conditional exaction," the grant of "a government benefit in exchange," and "choice" about whether to use the property in a manner that could trigger the condition). The court found the reserve requirement constitutional because it had a "sufficient nexus" to the government's goal of stabilizing the raisin market and was "roughly proportional" to that goal, requiring handlers to reserve only the quantity of raisins necessary to achieve market stabilization for the benefit of all producers. *Id.* at 26a-29a.

SUMMARY OF ARGUMENT

I. In order to stabilize the raisin market and ensure parity prices for producers who voluntarily enter that market, the raisin marketing order authorizes a reserve pool, which functions to control the timing of

sales and channels of trade for reserve raisins while preserving producers' right to the net proceeds from those sales. That regulation does not effect a per se physical taking.

A. No categorical taking occurs because producers retain the most important property right in reserve raisins: ownership of the net proceeds from their sale. 7 U.S.C. 608c(6)(E); 7 C.F.R. 989.66(h). Unlike real property or unique personal property, reserve raisins are a fungible commodity, valuable to producers only insofar as they generate sales revenue. In this commercial context, the right to possess the raisins is not an essential property interest—indeed, producers voluntarily relinquish that right by delivering their crop to handlers. Because producers retain the most critical property interest in the raisins, the marketing order does not fit within the narrow category of government actions that effect a per se physical taking by extinguishing all of an owner's essential property rights. See *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).

B. A categorical analysis is also unwarranted because producers are subject to the reserve requirement due to their voluntary choice to market raisins in commerce. Because the market for agricultural commodities has long been subject to extensive regulation and the establishment of a reserve pool is rationally related to the legitimate government interest in ensuring orderly market conditions and fair prices for producers, the government may condition participation in that market on compliance with the reserve requirement. See *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1007 (1984).

C. Petitioners' arguments that the marketing order nonetheless effects a per se taking are unavailing. Relying principally on *Loretto*, petitioners contend that a categorical rule applies whenever a regulation affects possessory rights, even if the property owner retains other important rights. But *Loretto* instead justified a per se rule on the contrary proposition that a permanent physical occupation "effectively destroys *each* of [the owner's] rights" in the space affected by the occupation. 458 U.S. at 435. The other decisions petitioners cite are similarly inapt, and several precedents from this Court disprove their assertion that the reserve regulations trigger a per se analysis.

Petitioners are also wrong to argue that producers' right to the net proceeds from reserve-raisin sales is not a valuable property interest. The RAC has no authority to appropriate the raisins for its own use, but rather is required to sell them "at prices and in a manner intended to maxim[ize] producer returns." 7 C.F.R. 989.67(d)(1). Because a reserve pool is established only when supply greatly exceeds demand, reserve raisins have depressed market value, but the RAC nevertheless generates proceeds for producers by channeling the raisins to secondary markets or delaying their sale until subsequent crop years when supply is short. In a chronic over-supply situation, it may not be possible to sell reserve raisins at prices that generate net proceeds after deducting program-related expenses, but even in that situation the reserve requirement benefits producers by shoring up domestic prices and so increasing their return on their crop as a whole.

D. Petitioners effectively seek a new categorical rule that a taking occurs when government regulation

affects possession of an article of commerce in a highly regulated market that producers voluntarily enter, even though the regulation assures overall parity prices and producers retain ownership of the net proceeds from the sale of the commodity. Considerations of fairness and justice compel rejection of such a categorical rule.

II. Petitioners' takings claim also fails on the merits because producers may seek just compensation under the Tucker Act, 28 U.S.C. 1491(a)(1); thus, there is no taking "without just compensation" in violation of the Fifth Amendment. The AMAA's "comprehensive remedial scheme" withdraws Tucker Act jurisdiction over claims brought by handlers, see *Horne I*, 133 S. Ct. at 2063, but it does not displace a Tucker Act remedy for producers.

Although petitioners have raised a takings defense in their capacity as *handlers*, that defense improperly seeks to enforce *producers'* property rights in reserve raisins. But even under such a defense, the relevant question would be whether the reserve requirement takes producers' property without just compensation *for producers*. Because the Tucker Act supplies a mechanism for producers to obtain compensation, any taking effected by the reserve requirement is not unconstitutional.

III. If this Court nonetheless concludes that petitioners' takings defense has merit, it should remand for the lower courts to calculate what compensation, if any, is due. Petitioners are not automatically entitled to reversal of the fine imposed for their deliberate violation of the marketing order. Rather, it at least would be necessary to calculate what value all of the raisins would have had in the absence of the market-

ing order—which would need to account for the increase in free-tonnage prices and other benefits provided by the regulatory program. Even if a taking occurred, there is no constitutional violation—and no compensation required—if the "net loss was zero." *Brown* v. *Legal Foundation of Washington*, 538 U.S. 216, 237 (2003).

ARGUMENT

I. THE RAISIN RESERVE REGULATIONS DO NOT EFFECT A PER SE TAKING

The Fifth Amendment's Just Compensation Clause provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. Amend. V. The purpose of the Clause is to ensure that the government does not "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960).

Given "the nearly infinite variety of ways in which government actions or regulations can affect property interests," the Court generally has eschewed "invariable rules" in applying the Just Compensation Clause. *Arkansas Game & Fish Comm'n* v. *United States*, 133 S. Ct. 511, 518 (2012). Instead, to determine whether government regulation "goes too far" and should be "recognized as a taking," *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922), the Court usually conducts an "ad hoc, factual inquir[y]" using the standards set forth in *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104, 124 (1978) (*Penn Central*). The *Penn Central* standards involve a "careful examination and weighing of all the relevant circumstances," *Palazzolo* v. *Rhode Island*, 533 U.S.

606, 636 (2001) (O'Connor, J., concurring), including "the character of the governmental action," the "economic impact of the regulation on the claimant," and the "extent to which the regulation has interfered with distinct investment-backed expectations." *Penn Central*, 438 U.S. at 124.

Although "no magic formula enables a court to judge, in every case, whether a given government interference with property is a taking," *Arkansas Game & Fish Comm'n*, 133 S. Ct. at 518, the Court has recognized "two relatively narrow categories" of "regulatory action that generally will be deemed *per se* takings for Fifth Amendment purposes." *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005). The first category is "a permanent physical occupation" of property, *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982), such as the "'classi[c] taking' in which the government directly appropriates private property for its own use." *Eastern Enterprises* v. *Apfel*, 524 U.S. 498, 522 (1998) (plurality opinion) (brackets in original; citation omitted). The Court has reasoned that a per se rule is warranted for physical appropriations because "the government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand." *Loretto*, 458 U.S. at 435. "A second categorical rule applies to regulations that completely deprive an owner of '*all* economically beneficial us[e]' of her property." *Lingle*, 544 U.S. at 538 (brackets in original) (quoting *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992)). "[I]n the extraordinary circumstance when *no* productive or economically beneficial use of [property] is permitted," the "total deprivation * * * is, from the []owner's

point of view, the equivalent of a physical appropriation." *Lucas*, 505 U.S. at 1017.

Petitioners have disavowed any reliance on the case-specific *Penn Central* inquiry. They apparently recognize that the raisin marketing order's fair and proven measures for stabilizing the market do not result in a taking under that test. The "character of the governmental action" is one of reasonable regulation of a commercial market in a fungible agricultural commodity; the "economic impact of the regulation" is to stabilize the market and ensure a sufficient price level for producers for all their raisins, both free tonnage and reserve; and petitioners, after decades of participation in the raisin market under the order, had no "distinct investment-backed expectations" in being able to sell raisins without complying with the order's reasonable requirements. *Penn Central*, 438 U.S. at 124.

Petitioners also do not argue that the reserve requirement extinguishes "all economically beneficial use" of their property under a "total regulatory taking" analysis. *Lucas*, 505 U.S. at 1019, 1026. Petitioners could not prevail under that test because the relevant "'property interest' against which the loss of value is to be measured" is a raisin producer's crop as a whole, and the reserve requirement boosts producers' total returns by stabilizing the market price of raisins and increasing revenues from the sale of free-tonnage raisins. *Id.* at 1016 n.7; see Pet. App. 213a ("relevant parcel" for total regulatory taking analysis is "the entirety of [petitioners'] annual crop, not the individual raisins destined for the reserve pool"). Moreover, even with respect to the reserve raisins themselves, producers retain the beneficial interest in

the net sales proceeds, and that property right has the capacity to generate—and has historically generated—tens of millions of dollars in net economic value.

Rather than pursue those other takings theories, petitioners argue only that the reserve regulations effect a per se physical taking. But this case—involving one feature of an integrated regulatory program for the sale of a fungible commodity—is far removed from those involving a true physical appropriation. That conclusion is compelled for two principal reasons. First, producers retain the most essential property right in the reserve raisins—namely, the right to receive net proceeds from the sale of that portion of their fungible commodity, just as they receive the proceeds from the sale of the free-tonnage portion. Producers voluntarily relinquish possession and control of their entire crop to handlers for sale in accordance with the marketing order, demonstrating that their interest in the sales proceeds is the most valuable strand in the bundle of property rights. The reserve regulations simply regulate the timing of sales and channels of trade for one portion of their raisins in some years.

Second, producers become subject to the marketing order only by voluntarily entering the raisin market when they deliver their crop to handlers for sale. The reserve requirement that is then triggered for handlers constitutes a reasonable condition on producers' ability to benefit from that market, and it prevents any individual producer from obtaining an unfair advantage by selling his surplus raisins directly on the open market.

A. The Marketing Order Preserves Producers' Ownership Of The Net Proceeds From Sales Of Reserve Raisins

1. When assessing whether physical interference with property constitutes a taking under the Just Compensation Clause, this Court has long distinguished between a "permanent physical occupation," which warrants a categorical rule, and "a physical invasion short of an occupation," which is analyzed under the *Penn Central* balancing test. *Loretto*, 458 U.S. at 430, 435 & n.12. That distinction requires examination of the existence and relative importance of any property rights that remain with the owner. The Court has justified using a per se rule for permanent physical occupations because they extinguish all of the owner's property interests in practical effect; "[t]o borrow a metaphor, the government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand." *Id.* at 435 (citation omitted). For example, in *Loretto*, the Court held that a per se taking had occurred because the permanent installation of a cable box "effectively destroy[ed] *each* of [the owner's] rights" in the space occupied by the box. *Ibid.*

In contrast, when government regulation impacts some strands in the bundle of property rights but the owner retains important interests in the property, the Court has applied the *Penn Central* test to evaluate whether the regulation amounts to a taking. See, *e.g.*, *Hodel* v. *Irving*, 481 U.S. 704, 713-717 (1987) (applying *Penn Central* to statute providing that title to land would escheat to an Indian tribe after the owner's death); *PruneYard Shopping Ctr.* v. *Robins*, 447 U.S.

74, 82-83 (1980) (*PruneYard*) (applying *Penn Central* when private shopping center was required to permit citizens to exercise free expression and petition rights on its property). The justification for a categorical rule does not apply if the owner is not "absolutely dispossess[ed]" of essential rights in the property. *Loretto*, 458 U.S. at 426, 435 n.12. Instead, the Court subjects such measures to the *Penn Central* balancing process in order to "determin[e] when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Kaiser Aetna* v. *United States*, 444 U.S. 164, 175 (1979) (quoting *Penn Central*, 438 U.S. at 124).

2. To the extent those decisions are instructive in this quite different context of regulation of a commercial market, the marketing order does not effect a per se taking because raisin producers retain the most critical property interest in the reserve portion of the fungible commodity they deliver to handlers: ownership of the net proceeds from sales of reserve raisins.[2]

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[2] Petitioners argue (Br. 23-24) that the reserve requirement transfers title in reserve raisins from producers to the RAC. In *Evans* v. *United States*, 74 Fed. Cl. 554 (2006), the CFC stated without analysis that the RAC obtains title. *Id.* at 557. The government has previously cited *Evans* for the proposition that title transfers to the RAC. However, neither the AMAA nor the marketing order refers to title. To the extent that California law governs that issue, see *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1001 (1984), we are unaware of any case determining who holds title when producers of a commodity retain ownership of the net sale proceeds of their product, but another entity controls the timing of sales and channels of trade. In the somewhat analogous context of trusts, California law provides that the "creation of a

The AMAA explicitly preserves that property interest, authorizing the establishment of reserve pools only if the "net return derived from the sale" of the commodity is distributed to producers. 7 U.S.C. 608c(6)(E). The raisin marketing order in turn preserves producers' right to "[t]he net proceeds from the disposition of reserve tonnage raisins" on a pro rata basis. 7 C.F.R. 989.66(h). And the order further protects that property interest by specifying that "[r]eserve tonnage raisins shall be sold * * * at prices and in a manner intended to maxim[ize] producer returns." 7 C.F.R. 989.67(d)(1).

Producers' beneficial interest in the net sales proceeds is not some insignificant interest in the reserve raisins; it is the most important property right. The marketing order does not apply to any raisins a producer chooses to retain for his own consumption or for any other reason. Because the reserve requirement thus applies only to raisins prepared and acquired by a handler for market, see generally 7 C.F.R. 989.15, 989.66, reserve raisins, like free-tonnage raisins, are "ordinary articles of commerce, desirable because convertible into money." *Leonard* v. *Earle*, 279 U.S. 392, 396 (1929). Unlike real property or unique per-

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trust divides title," with the trustee holding bare legal title and the beneficiary holding equitable title. *Allen* v. *Sutter County Bd. of Equalization*, 189 Cal. Rptr. 101, 103 (Cal. Ct. App. 1983) (citing *Gonsalves* v. *Hodgson*, 237 P.2d 656 (Cal. 1951)). Thus, title in reserve raisins may be divided between producers and the RAC.

In any event, we agree with petitioners (Br. 24-25) that title is not dispositive of whether a per se or *Penn Central* takings analysis applies here. See *Irving*, 481 U.S. at 713-717 (applying *Penn Central* where statute provided that title to land would pass to an Indian tribe upon the landowner's death); *Loretto*, 458 U.S. at 435 (finding per se taking even though owner retained title).

sonal property, raisins (including reserve raisins) prepared for market have value *only* insofar as they create revenue for producers. See Pet. App. 28a (reserve raisins "are fungible," in contrast "to land, which is unique"). Accordingly, instead of "effectively destroy[ing]" all property rights in the raisins, *Loretto*, 458 U.S. at 435, the marketing order preserves the most critical of those rights. To borrow this Court's terminology, the reserve requirement does not categorically "oust[] the owner from his domain," because the "domain" of a raisin producer who delivers raisins to a handler is raisin *sales*, and the reserve requirement preserves the producer's property interest in the net sales proceeds from his crop. *Lingle*, 544 U.S. at 539.

Because reserve raisins are a fungible commodity, useful to their owners only by generating revenue, any interests in lasting possession and control affected by the marketing order cannot reasonably be viewed as "the most treasured strands in [the] owner's bundle of property rights." *Loretto*, 458 U.S. at 435; see *PruneYard*, 447 U.S. at 84 (considering whether property right alleged to have been taken was "essential to the use or economic value of the[] property"). Indeed, the reserve requirement does not even apply until producers have voluntarily *surrendered* possession and dispositional control of their crop by delivering raisins to handlers.

Because producers retain that critical property interest in their pro rata share of the reserve raisins held by handlers, the marketing order cannot properly be characterized as a per se confiscation of that share, even if it is artificially viewed in isolation from the rest of the crop the producer has delivered to the

handler. Rather, the reserve requirement functions as a regulation of the timing and permissible channels for the handler's selling of reserve raisins, intended to stabilize the market and ensure that producers receive parity prices for their product. Petitioners concede (Br. 23) that "regulatory schemes that simply restrict when agricultural products may be sold, how many, or in what markets" do "not implicate [a] categorical rule" under the Just Compensation Clause. But that is how the reserve regulations operate. They prevent immediate sale of reserve raisins to avoid flooding the domestic market and driving down prices, and they channel excess supply that otherwise could not sell on the open market to secondary outlets that do not compete with the domestic market—all in order to "maxim[ize] producer returns and achieve maximum disposition" of the raisins. 7 C.F.R. 989.67(d)(1). This Court has rejected Just Compensation Clause challenges to far more restrictive regulations that bar the sale of a product altogether. See *Andrus* v. *Allard*, 444 U.S. 51, 66 (1979) (regulation that prohibited sale of eagle artifacts, and thus "prevent[ed] the most profitable use of [plaintiffs'] property," did not effect a taking). The raisin-reserve program does not become *less* constitutional when, instead of barring sale of reserve raisins altogether, it permits sales to occur at certain times and in certain outlets and preserves producers' ownership of the net proceeds generated by those sales.

B. The Marketing Order Affects Producers Based On Their Voluntary Choice To Enter A Commercial Market

A per se takings analysis is also inappropriate because producers become subject to the reserve re-

quirement only by voluntarily entering the commercial market for raisins. The government may condition the benefits provided by an orderly market on handlers' compliance with the reserve requirement.

1. In *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984), the Court considered a takings challenge to a statute that authorized the government to publicly disclose trade secrets it acquired from pesticide manufacturers as part of a registration process that was a prerequisite to selling pesticides. *Id.* at 990-991. The Court recognized that "the right to exclude others is central to the very definition of the property interest" in a trade secret. *Id.* at 1011. But the Court nevertheless rejected the manufacturer's plea to analyze the statute under a "hard and fast rule[]," Appellee Br. at 35-36 & n.49, *Monsanto*, *supra* (No. 83-196) (citing *Loretto*, 458 U.S. at 435), instead applying the *Penn Central* standards. *Monsanto*, 467 U.S. at 1005.

In conducting that analysis, the Court distinguished between trade secrets submitted before the statute became effective—which the Court held may have been taken in violation of the Just Compensation Clause, *Monsanto*, 467 U.S. at 1013-1014—and trade secrets submitted after the statute took effect. The critical difference was that manufacturers had "voluntarily submi[tted]" the data (which would then eventually be subject to public disclosure) after the statute was effective, "in exchange for the economic advantages of a registration" necessary to market the products. *Id.* at 1007. That voluntary action demonstrated that manufacturers were "willing to bear th[e] burden" of surrendering their rights in the trade secrets "in exchange for the ability to market pesticides in this country." *Ibid.* The Court concluded

that, because the producer was "aware of the conditions under which the data [were] submitted" and those conditions were "rationally related to a legitimate Government interest," the "voluntary submission of data * * * c[ould] hardly be called a taking." *Ibid.*

This Court's decision in *Yee* v. *City of Escondido*, 503 U.S. 519 (1992), further reflects the importance of voluntary action in determining whether a taking has occurred, even with respect to real property. *Yee* declined to apply a categorical rule to a rent-control ordinance that effectively granted a tenant a "right to occupy the land indefinitely at a submarket rent." *Id.* at 527. The Court explained that the landowners had "voluntarily rented their land" and so could not establish a per se physical taking, which occurs "only where [the government] *requires* the landowner to submit to the physical occupation of his land." *Ibid.*; see *FCC* v. *Florida Power Corp.*, 480 U.S. 245, 252 (1987) ("This element of required acquiescence is at the heart of the concept of occupation."). *Yee* illustrates that when a property owner voluntarily limits his property rights—*e.g.*, giving up his right to exclude by renting real property to a tenant—the government does not commit a per se taking by regulating the terms of that bargain. See 503 U.S. at 531 (rejecting per se analysis because landowners "voluntarily open their property to occupation by others").

The Court's precedents on land-use exactions also reflect the distinction between government conditions and government commands. In *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994), the Court held that impositions on property that would amount to a

taking in the absence of any voluntary action by the owner should be subject to a different analysis when the restrictions are conditions on the owner's ability to obtain a land-use permit. See *Nollan*, 483 U.S. at 836-837; *Dolan*, 512 U.S. at 384. When a restriction is imposed as a permitting condition, it is permissible so long as it bears an "essential nexus" to the government's interests in land-use regulation and is roughly proportional "in nature and extent to the impact of the proposed development." *Dolan*, 512 U.S. at 386-387, 391.

2. Like the regulations at issue in *Monsanto* and *Yee*, the raisin-reserve regulations do not qualify as a per se taking because they are triggered only through producers' voluntary choice to market raisins in commerce. See Pet. App. 25a. That element of voluntariness distinguishes the marketing order from petitioners' unrealistic hypotheticals (Br. 20) involving "appropriat[ion]" of "the reserve-tonnage raisins at gunpoint." The marketing order does not "*require*[] [producers] to submit to [a] physical occupation" of their property, *Yee*, 503 U.S. at 527, but merely conditions their participation in the commercial market on compliance with regulations aimed to ensure the orderly operation of that market.

A producer's decision to voluntarily enter the market is similar to the "voluntary submission of data" necessary to gain the "ability to market pesticides" that this Court found dispositive in *Monsanto*. 467 U.S. at 1007.[3] As in *Monsanto*, the sale of agricultural

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[3] The intangible trade secret in *Monsanto* could not be physically appropriated in the same sense as land or tangible personal property. But the Court recognized that "[o]nce the data that constitute a trade secret are disclosed to others, * * * the

commodities has long been subject to extensive regulation; raisin producers are aware that any reserve requirement in effect will apply to raisins they choose to deliver to a handler for marketing; and producers' voluntary delivery of their crop demonstrates that they are "willing to bear th[at] burden." *Ibid.* This Court observed that the regulatory scheme in *Monsanto* could "hardly be called a taking" *ibid.*—which suggests that, at the very least, the raisin marketing order cannot constitute a taking *per se*.

Two additional aspects of the marketing order fortify that conclusion. First, producers who are dissatisfied with the reserve regulations may "plant[] different crops" not subject to a reserve, or sell their raisin-variety grapes as table grapes or for use in juice or wine, thereby avoiding the reserve pool. Pet. App. 26a; see *Monsanto*, 467 U.S. at 1007 n.11 (observing that manufacturers could choose to sell pesticides "only in foreign markets" to protect their trade secrets). Second, producers exercise considerable control over the reserve requirement itself. Producers nominate 35 of the 47 members of the RAC, which has responsibility for recommending whether raisins should be held in reserve. 7 C.F.R. 989.26. In addition, the marketing order took effect only because producers approved it, 7 U.S.C. 608c(8) and (9), and the Secretary must terminate the order if a majority of producers want it to be repealed. 7 U.S.C. 608c(9) and (16)(B); 7 C.F.R. 989.91(c). The absence of any such action during the 65 years that the order has been in effect indicates that raisin farmers generally

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holder of the trade secret has lost his property interest in the data." 467 U.S. at 1011.

perceive themselves to be advantaged by the order's stabilization of prices.[4]

Monsanto further shows that petitioners are wrong to assert (Br. 56-57) that the provision for a reserve pool constitutes an unconstitutional condition on the right to participate in commerce. Monsanto raised an identical argument, contending that "the relinquishment of private property cannot be deemed a condition of engaging in interstate commerce." Appellee Br. at 29, *Monsanto*, *supra* (No. 83-196) (citing *Loretto*, 458 U.S. at 419). The Court rejected that contention, observing that the government had a wide berth to regulate the commercial market for pesticides and reasoning that the condition was "rationally related to a legitimate Government interest." 467 U.S. at 1007. So too here, the market for agricultural commodities has long been subject to extensive regulation, and the establishment of a reserve pool—which regulates the timing and channels of trade but preserves producers' property right in the net proceeds from reserve raisins—is rationally related to the legitimate interest in ensuring orderly market conditions and fair prices for producers.[5]

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[4] Petitioners observe (Br. 5) that producers have not voted on the order since 1949. But that is because producers have opted not to vote. In 1989, the Secretary proposed requiring referenda every six years for raisin producers to vote on the continued application of the order. See 54 Fed. Reg. 12,205. Producers rejected that proposal. *Id.* at 34,134-34,135.

[5] In *Loretto*, this Court stated that "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation." 458 U.S. at 439 n.17. But *Loretto* involved a condition requiring an owner of real property to suffer a permanent physical occupation and so effectively give up all rights in that portion of his property. The analysis in *Loretto*

For similar reasons, the reserve requirement satisfies the nexus and rough proportionality test that the court of appeals drew from the land-use permitting context under *Nollan* and *Dolan*. See Pet. App. 23a-28a. Petitioners criticize the court of appeals' invocation of that test on the ground that the government has "an unusual need for discretion in setting land use conditions." Pet. Br. 54. But as this Court has previously recognized, the government enjoys even greater discretion when it regulates fungible commodities in a commercial market. See *Lucas*, 505 U.S. at 1027 (recognizing government's "high degree of control over commercial dealings" involving personal property); *Allard*, 444 U.S. at 66 (upholding government's power to prohibit sale of certain personal property altogether). By limiting supply in years of great overproduction and releasing reserved raisins later, the reserve regulations bear the requisite nexus to the market instability created by a fluctuating supply of raisins. And by tailoring the reserve percentage to the amount of supply that exceeds domestic demand, the reserve requirement is roughly proportional "both in nature and extent to the impact of" the overproduction that prompts its creation. *Dolan*, 512 U.S. at 391.

Petitioners contend (Br. 55-56) that an outright sales ban would equally address the negative externalities associated with the oversupply of raisins. But a sales ban, which would render surplus raisins "economically worthless," *Lucas*, 505 U.S. at 1028, is a less proportional response to the market disequilibrium

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does not apply here, where producers retain the most essential property interest in a fungible commodity transferred for sale, and the reserve requirement plays a critical role in stabilizing the market they have voluntarily entered.

than the reserve regulations, which preserve producers' ownership of the net proceeds of raisins subject to the requirement. And a sales ban also would not fully serve the AMAA's goal of bringing "predictability to the market for producers and consumers alike," Pet. App. 2a, because it would do nothing to address supply shortages. In light of petitioners' concession that the government may prohibit the sale of raisins without effecting a per se taking, "it would be strange to conclude" that the AMAA is unconstitutional because it "provid[es] the owner an alternative to that prohibition" by controlling the timing and channels of sales through a reserve pool. *Nollan*, 483 U.S. at 836-837.

C. Petitioners' Arguments That The Marketing Order Effects A Per Se Taking Are Unpersuasive

Petitioners contend (Br. 20-27, 42-45, 49-52) that this Court's decisions find a categorical taking any time "the government takes possession of property," no matter what property rights remain with the owner and no matter whether the regulation applies only as a result of the owner's voluntary choices. Petitioners further suggest (Br. 42-47) that a per se rule is warranted because their ownership of the net sales proceeds from reserve raisins is a "speculative and unsubstantiated benefit[]." Those arguments lack merit.

1. Petitioners argue (Br. 21) that producers' ownership of the sales proceeds from reserve raisins is irrelevant because producers lose possession of the raisins themselves.[6] At the outset, it again bears em-

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[6] Although petitioners refer at times to producers' loss of "dispositional control," Br. 21, they concede that regulatory schemes that affect the right to dispose of property, such as those restricting "when agricultural products may be sold, how many, or in what

phasis that raisins become subject to the reserve requirement only after producers voluntarily *relinquish* possession by delivering raisins to handlers. See 7 C.F.R. 989.66(a) and (b)(1). Thus, producers do not actually exercise greater possessory rights with respect to free-tonnage raisins as compared to reserve-tonnage raisins. Moreover, the RAC does not take physical possession of reserve raisins, but rather leaves them in storage with handlers. See *Lion Raisins, Inc.* v. *United States*, 416 F.3d 1356, 1360 (Fed. Cir. 2005). From the starting gate, petitioners' reliance on possessory rights is misplaced.

In any event, petitioners are wrong to assert that a categorical rule always applies when a regulation affects possession of property, no matter what rights remain with the owner. Petitioners principally rely (Br. 44) on *Loretto*, which they read to find a categorical analysis warranted "even if some economically valuable property interests are left." But the Court instead justified a per se rule on the contrary proposition that the appropriation had "effectively destroy[ed] *each* of [the owner's] rights" in the space occupied by the cable box. *Loretto*, 458 U.S. at 435. The Court explained that the regulation left the owner with "no right to possess the occupied space himself, and also [with] no power to exclude the occupier from possession and use of the space." *Ibid.* Moreover, "even though the owner [could] retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger * * * empt[ied] the right of any value."

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markets," do "not implicate [a] categorical rule," Br. 23. Thus, petitioners' contention that a physical taking has occurred necessarily focuses on a loss of possession.

Id. at 436. Thus, the government had not "simply take[n] a single 'strand' from the 'bundle' of property rights," but had "chop[ped] through the bundle, taking a slice of every strand." *Id.* at 435.

Petitioners' rule similarly finds no support in the line of cases recognizing a categorical physical taking when the government "seize[d] the use and disposition" of real property but permitted the owner to retain title. Pet. Br. 24-25. In those cases the regulation so fully extinguished the owner's property rights that the government was treated as if it "held full title and ownership" for the duration of the occupation. *United States* v. *United Mine Workers*, 330 U.S. 258, 284-285 & n.46 (1947) (plurality opinion). For example, in *United States* v. *Pewee Coal Co.*, 341 U.S. 114 (1951), the government's seizure of mining facilities was "complete," leaving the claimant with no interest in the mining business—and, in particular, no right to "receive operating profits"—during "the period of government control." *Id.* at 116, 118 (citation omitted).

Petitioners also are not aided by cases holding that just compensation is required for a physical taking no matter whether the occupied space is "an entire parcel or merely a part thereof." *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002) (*Tahoe-Sierra*). The Court was simply making clear that when the government physically appropriates and extinguishes all rights in a discrete portion of property—for example, when it takes "one acre of a hundred-acre farm to build a post office," Pet. Br. 44—it must provide just compensation for that portion. See *Tahoe-Sierra*, 535 U.S. at 322. Courts accordingly "do not ask whether a physical

appropriation * * * deprives the owner of all economically valuable use" in the *rest* of the property. *Id.* at 323. But that observation has no bearing on what takings analysis applies when the owner retains important rights in the very portion that was alleged to have been taken, especially the portion of a fungible commodity committed to sale.

Finally, petitioners' reliance on *Kaiser Aetna*, *supra*, is misplaced. Petitioners understand (Br. 44) *Kaiser Aetna* to hold that a regulation requiring a "private marina to admit the public is a categorical taking even though the marina continued to have economic value." Contrary to petitioners' assertion, and as this Court summarized in *Loretto*, "the easement of passage" at issue in *Kaiser Aetna* "was *not* considered a taking *per se*." *Loretto*, 458 U.S. at 433 (first emphasis added). Rather, applying the *Penn Central* balancing approach, the Court held that the easement encroached on the "most essential stick[]" in the marina owner's "bundle of [property] rights" and went "so far * * * as to amount to a taking." 444 U.S. at 176, 178. *Kaiser Aetna* thus confirms that the *Penn Central* inquiry, rather than a per se analysis, is appropriate here.

In addition to *Kaiser Aetna*, other decisions of this Court refute petitioners' argument that a categorical analysis applies to any regulation that affects possessory interests. For example, in *Irving*, *supra*, the Court applied the *Penn Central* framework to a law that required title to land to escheat to an Indian tribe after the landowner's death. 481 U.S. at 713-718. Although the challengers urged the Court to apply a per se rule on the ground that the "decedents upon death completely lose their property interest," there-

by suffering a "permanent physical deprivation," Appellees Br. at 31, *Irving*, *supra* (No. 85-637), the Court recognized that "the whole of [the] decedents' property interests were not taken" because the decedent retained a life estate and the right to convey the property *inter vivos*. *Irving*, 481 U.S. at 715. To provide another example, in *Bowen* v. *Gilliard*, 483 U.S. 587 (1987), the Court applied the *Penn Central* balancing test to a statute that required an applicant for federal welfare benefits to assign her right to receive child-support payments to the State. *Id.* at 591, 606-608. Although the statute required a surrender of the child-support payments, the State subsequently "remit[ted] the amount collected to the custodial parent," leading the Court to conclude that it would elevate "form over substance" to find that the forced assignment effected a taking. *Id.* at 605-606.

Similarly, in the context of the federal government's possession and management of Indian tribal lands held in trust, the Court has distinguished between takings claims based on a direct appropriation and claims challenging regulations intended "to make the tribal property productive, and secure therefrom an income for the benefit of the tribe." *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294, 307 (1902). Thus, in *United States* v. *Creek Nation*, 295 U.S. 103 (1935), the Court found a categorical physical taking when the government sold a tribe's land to settlers, because the sale was "an act of confiscation." *Id.* at 110 (citation omitted). In contrast, the Court declined to find a per se physical taking in *Cherokee Nation* when a tribe challenged the federal government's authority to grant leases for mining on lands the tribe owned in fee simple. 187 U.S. at 307. The tribe argued that the

regulation would deprive it of its "exclusive use and occupation of the lands," Appellants Br. at 18, *Cherokee Nation*, *supra* (No. 340), but the Court held there was "no question involved in this case as to the taking of property" because the income generated from the leases would be remitted to the tribe. 187 U.S. at 307.

2. Petitioners next suggest (Br. 21) that producers' right to the net proceeds from reserve-raisin sales is not a valuable property interest because the marketing order "compels transfer of the reserve raisins to the government, for the government's own use or sale," resulting in years in which no proceeds are distributed. See *id.* at 42, 47. That argument mischaracterizes how the marketing order operates and ignores the substantial benefits it confers.

Petitioners are wrong to assert (Br. 1, 21, 41) that the reserve requirement permits the government to appropriate property for its own use.[7] The marketing order directs the RAC to "efficient[ly] administ[er]" the raisin-reserve program, 7 C.F.R. 989.36(*l*), and guides the RAC's activities in accordance with the AMAA's goals of achieving "parity prices" for growers and "orderly marketing conditions for agricultural commodities in interstate commerce." 7 U.S.C. 602(1). Although petitioners maintain (Br. 1) that the RAC has "absolute discretion" in disposing of reserve rai-

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[7] Petitioners repeatedly suggest that the RAC provides reserve raisins to the government for free. See, *e.g.* Pet. Br. 7 (asserting that RAC may give raisins "to United States agencies (for example, for school lunches)"). That is not accurate. Surplus raisins procured by the government, including raisins for the National School Lunch Program, are purchased following a competitive bidding process. See generally USDA, *Commodity Purchasing* (Mar. 2015), http://www.ams.usda.gov/AMSv1.0/commoditypurchasing.

sins, the regulations prescribe the permissible channels of trade, 7 C.F.R. 989.67(b), and require the RAC to sell the raisins "at prices and in a manner intended to maxim[ize] producer returns and achieve maximum disposition" of the reserve, 7 C.F.R. 989.67(d)(1).[8] Following that directive, the RAC has in many years been able to generate tens of millions of dollars in net proceeds for producers from the sale of reserve raisins—including more than $47 million in net distributions during one of the crop years at issue in this case.

Petitioners are further wrong (Br. 47) to characterize those payments as "*inadequate* compensation" for a categorical taking. Rather, the net proceeds from reserve-raisin sales reflect the reasonable value of that portion of the fungible commodity producers have delivered to handlers. A raisin reserve is established only when supply greatly exceeds demand. Because

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[8] Petitioners state (Br. 1) that the RAC may "give away" the raisins in its "absolute discretion." That is incorrect. The regulations permit raisins to be disposed of by gift, 7 C.F.R. 989.67(b)(4), but also obligate the RAC to "maxim[ize] producer returns," 7 C.F.R. 989.67(d)(1). The regulations would allow raisins to be donated, *e.g.*, to generate good will or when the costs of maintaining them—paying for their storage, fumigation, inspection, and so forth, 7 C.F.R. 989.67(j), 989.82, 989.401—would exceed their expected future sales price, which may occur as they near the end of their shelf life. From 2002 to 2010, less than 2% of the total reserve supply was donated each year. See RAC, *Marketing Policy & Industry Statistics 2010*, at 25 (Jan. 6, 2011), http://raisins.org/files/Marketing%20Policy%202010.pdf. In these circumstances, and given the goodwill attendant to charitable contributions, such gifts raise no substantial takings claim in the context of the program as a whole.

In any event, even if donations raised concerns under the Just Compensation Clause, a takings claim would properly be limited to the small portion of raisins that were actually donated.

the RAC "release[s] the full trade demand" as free-tonnage raisins, 7 C.F.R. 989.54(d), reserve raisins by definition have depressed value because there is no domestic demand for them.[9] In response to this imbalance between supply and demand, a reserve requirement increases overall value for producers in multiple ways. First, the reserve ensures that an excess supply of raisins will not immediately glut the domestic market and drive down free-tonnage prices. Second, reserve raisins can be channeled to secondary markets—such as export markets and government contracts—that do not compete with the domestic market and so present opportunities to sell excess supply without deflating domestic prices. Third, reserve raisins can be released as free tonnage in subsequent crop years when supply is short and generate revenue through delayed sales. By stabilizing the market and cultivating non-competitive outlets for

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[9] Petitioners are therefore mistaken to suggest (Br. 26 n.7) that "the price of raisins would have to almost double" for a producer to be "better off" when the reserve is 47%. That argument erroneously assumes that producers would otherwise be able to sell reserve raisins at free-tonnage prices without affecting those prices. But producers would have considerable difficulty selling reserve raisins at those rates because domestic demand is inelastic and would already be fulfilled by the free-tonnage percentage. Even if a particular producer could sell his entire crop in an unregulated market when supply vastly exceeded demand, the collective value of the raisins would be substantially lower—which is exactly what occurred prior to the AMAA's enactment. This Court had "no doubt" that in an unregulated market raisin producers were "compelled to sell at less than parity prices" and even for "less than the cost of production." *Parker* v. *Brown*, 317 U.S. 341, 363-364 (1943).

raisins, the reserve requirement thus *increases* the value of producers' property.[10]

Market forces also explain why some crop years result in no net proceeds from reserve-raisin sales. When supply exceeds demand year after year, reserve raisins accumulate and their value falls. In a chronic over-supply situation, it becomes increasingly difficult to dispose of the raisins and the costs associated with maintaining them mount. When the increased costs of the reserve pool equals or exceeds the lower gross revenue obtained from raisin sales, no net proceeds will be distributed. But even in that situation, the reserve requirement serves the function of shoring up domestic prices and so increasing producers' return on free-tonnage raisins, and thus the overall return on their crop as a whole. Moreover, the analysis of the reserve mechanism should not be confined to one year in isolation, but should evaluate the regulatory program over the long term.

To the extent petitioners argue that a per se taking occurs because they receive the net, rather than gross, proceeds from reserve-raisin sales, their claim again

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[10] Because raisins held in reserve may be sold in non-competitive outlets or later released as free tonnage, it is inaccurate to state that volume control provides the only benefit to producers. Pet. Br. 25-26. Producers benefit from the RAC's efforts to find alternative channels of commerce for the raisins, which increase net sales proceeds. Nor do those sales in secondary markets "counteract the price effects of the volume controls," *id.* at 26 n.7, given the RAC's obligation to ensure that reserve raisins are sold only in outlets that do not compete with free-tonnage raisins. 7 C.F.R. 989.67(a). By establishing a reserve pool, rather than simply instituting volume control, the marketing order also enables producers to meet full market demand in years when supply is short due to crop failure or other factors. See 7 C.F.R. 989.67(j).

lacks merit. The RAC properly deducts its expenses from gross revenues because they are necessary costs of managing and liquidating the reserve pool. See *United States* v. *Sperry Corp.*, 493 U.S. 52, 62-63 (1989) (rejecting takings challenge to user fee imposed for government services, even though the claimant "would rather not have used" those services).

Petitioners object in particular to the subsidies provided to sell reserve raisins in export markets (Br. 7, 18, 25), asserting that they receive "no benefit" from those sales. But all producers benefit when raisins are sold for export because the proceeds are pooled together, with each producer receiving his pro rata share. To be sure, raisins sell at lower prices in export markets. Therefore, when a handler buys reserve raisins at free-tonnage prices in order to export them, 7 C.F.R. 989.54(g), the RAC must reimburse part of the free-tonnage price through an export subsidy, 7 C.F.R. 989.53(a), or else the sale would not occur. But petitioners are wrong to suggest that producers would be better off if that sale did not occur, because the sale permits producers to realize *some* value from reserve raisins, rather than having them remain in storage where they would generate no revenue at all. Importantly, the RAC has no authority to bypass a profitable domestic market in favor of a less profitable export market. See 7 C.F.R. 989.67(d)(1). Thus, export sales—and attendant export subsidies—occur only when there is no better way to "maxim[ize] producer returns." *Ibid.* In sum, the net proceeds producers receive in any given year reflect market

forces and the true value of their oversupplied commodity, rather than any appropriation by the RAC.[11]

D. There Is No Basis To Recognize A New Per Se Rule In This Context

At bottom, petitioners seek a new categorical rule that any regulation that affects possessory rights triggers a per se taking, even if the owner becomes subject to the regulation by voluntarily entering a commercial market for a fungible commodity and retains the most essential property interest in the portion of her commodity that is subject to the challenged regulation. In determining whether to extend a per se analysis to a new context, this Court has recognized that "the ultimate constitutional question is whether the concepts of 'fairness and justice' that underlie the Takings Clause will be better served by [a] categorical rule[] or by a *Penn Central* inquiry into all of the relevant circumstances in particular cases." *Tahoe-Sierra*, 535 U.S. at 334. Considerations of fairness and justice compel rejection of a categorical rule here.

First, it is significant that the government has traditionally exercised a "high degree of control over commercial dealings" concerning "personal property." *Lucas*, 505 U.S. at 1027. Indeed, the raisin marketing order has been in effect for 65 years, and numerous other commodities have long been regulated under the

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[11] If petitioners mean to argue that the RAC's efforts to secure maximum returns for producers have fallen short, their recourse is to "file suit in federal district court, alleging that the Secretary or the RAC has violated the [AMAA], the raisin marketing order, or the associated regulations." *Evans*, 74 Fed. Cl. at 564. That claim is not properly pursued as a violation of the Fifth Amendment.

AMAA. A per se rule that takes no account of that experience and a property owner's reasonable investment-backed expectations regarding the sale of a fungible commodity could fundamentally disrupt the government's ability to adopt regulations that protect producers and consumers alike. Second, a categorical analysis would "place form over substance, and labels over reality," *Gilliard*, 483 U.S. at 606, by finding a taking based on the effect on possession even when that property interest is not a valuable strand in the owner's bundle of rights, as will typically be the case for fungible property introduced into commerce. Third, a per se rule would unjustly foreclose inquiry into the "actual impact of the [regulation] on" the value of raisins. *Tahoe-Sierra*, 535 U.S. at 338. It would be anomalous to find a categorical taking by disregarding producers' beneficial interest in the net proceeds from sales of reserve raisins and ignoring the effect of the reserve regulations in boosting revenue from their crop as a whole. See *Irving*, 481 U.S. at 715 ("average reciprocity of advantage" is an important factor in evaluating takings claim) (citation omitted). Fourth, a per se rule is not necessary to protect raisin producers' property rights. The case-specific *Penn Central* standards leave room for producers to argue that the operation of the reserve regulations has imposed such an undue economic burden and so thoroughly impeded their reasonable investment-backed expectations as to amount to a taking. See *Tahoe-Sierra*, 535 U.S. at 327 n.23 (resisting "[t]he temptation to adopt what amount to *per se* rules in either direction") (citation omitted).

In the context of this regulatory scheme, which was adopted with producers' approval and for their ex-

press benefit, a per se rule is far "too blunt an instrument" to determine whether the reserve regulations effect a taking. *Tahoe-Sierra*, 535 U.S. at 342 (quoting *Palazzolo*, 533 U.S. at 628). In the interests of "fairness and justice," the Court should reject petitioners' request for a new categorical rule. *Ibid.* (internal quotation marks omitted).

II. THE RESERVE REGULATIONS DO NOT VIOLATE THE JUST COMPENSATION CLAUSE BECAUSE PRODUCERS MAY OBTAIN COMPENSATION UNDER THE TUCKER ACT

Petitioners' argument that the marketing order takes producers' property in violation of the Just Compensation Clause fails for the independent reason that just compensation for any taking is available to producers under the Tucker Act, 28 U.S.C. 1491(a)(1); thus, the reserve requirement does not produce an *uncompensated* taking in violation of the Fifth Amendment. Petitioners concede that "[t]he constitutionality of the fine" imposed on them "rises or falls on the constitutionality of the Marketing Order's reserve requirement." Pet. Br. 31 (citation omitted). Because the reserve requirement is constitutional for this additional reason, so is the fine. See *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 697 n.18 (1949) ("[T]he availability of a suit for compensation against the sovereign will defeat a contention that the action is unconstitutional as a violation of the Fifth Amendment.").[12]

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[12] Contrary to petitioners' suggestion (Cert. Reply Br. 12), the government did not forfeit this argument. After this Court clarified in *Horne I* that petitioners pursued a takings defense only in their capacity as handlers, 133 S. Ct. at 2060-2061, the government argued in the Ninth Circuit that the availability of compensation

A. As its plain text makes clear, the Just Compensation Clause "does not proscribe the taking of property," but instead only "proscribes taking *without just compensation*." *Williamson County Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 194 (1985) (*Williamson County*) (emphasis added). Thus, when Congress has provided a "reasonable, certain and adequate provision for obtaining compensation," *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 125 (1974) (citation omitted), "an alleged taking is not unconstitutional." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297 & n.40 (1981) (*Virginia Surface*).

In this case, the Tucker Act supplies the requisite reasonable, certain, and adequate provision for obtaining just compensation in the event of a taking. See *Monsanto*, 467 U.S. at 1016-1017. By authorizing a suit against the United States in the CFC, the Tucker Act generally stands as an "implied[] promise[]" to pay any compensation due for a taking. *Yearsley* v. *W.A. Ross Constr. Co.*, 309 U.S. 18, 21 (1940); see *Preseault* v. *ICC*, 494 U.S. 1, 11 (1990). Congress may withdraw jurisdiction under the Tucker Act when, *e.g.*, it establishes an alternative mechanism for raising a takings claim. To determine whether Congress has displaced Tucker Act jurisdiction, this Court examines "the purpose of the statute, the entirety of its text,

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under the Tucker Act defeated petitioners' claim on the merits regarding raisins they produced. Appellee Supp. Br. at 3-7, *Horne I*, *supra* (No. 10-15270). Moreover, the government has consistently maintained that the marketing order does not take property without just compensation, and it therefore "can make any argument in support of that claim" without being "limited to the precise arguments [it] made below." *Yee*, 503 U.S. at 534.

and the structure of review that it establishes." *Horne I*, 133 S. Ct. at 2062-2063 (citation and brackets omitted).

In *Horne I*, this Court concluded that the AMAA withdraws Tucker Act jurisdiction over *handlers'* takings claims because the AMAA's "comprehensive remedial scheme" provides handlers with "a ready avenue to bring takings claim[s] against the USDA" that "challenge the content, applicability, and enforcement of marketing orders." 133 S. Ct. at 2063. Because Congress intended to channel handlers' claims through administrative proceedings, the Court concluded that handlers could not bring a Tucker Act suit. *Ibid.* But the Court made clear that this ruling did not imply that a *producer* "could not bring suit for just compensation in the Court of Claims," and it reserved judgment on "what impact the availability of such a claim would have on petitioners' takings-based defense." *Id.* at 2062 n.7. Those are the questions the case now squarely presents.

B. Under the governing principles announced by this Court, the AMAA does not withdraw Tucker Act jurisdiction over a producer's claim that the marketing order results in a taking of a producer's pro rata share of raisins reserved by a handler. The statutory text contains no express repeal of Tucker Act jurisdiction for producers' claims and provides no alternative procedures by which a producer could pursue relief with respect to an alleged taking. See 7 U.S.C. 608c(13)(B) and (14)(B); *Horne I*, 133 S. Ct. at 2063 (relying on AMAA's provision of alternative avenues for handlers to raise takings claims to find no Tucker Act jurisdiction).

Even in the absence of a withdrawal of Tucker Act *jurisdiction*, however, there is a category of cases in which equitable relief may be available in another forum because Congress is not properly understood to have intended the statutory provision involved—particularly one that adjusts the economic benefits and burdens of private parties—to require the payment of money from the Federal Treasury in the event of a taking, but would have intended instead for the program to be enjoined. See *Eastern Enterprises*, 524 U.S. at 521 (plurality opinion) (citing Gov't Br. at 38 n.30, *Eastern Enterprises* (No. 97-42)); see also Gov't Br. at 13 n.5, *Babbitt* v. *Youpee*, 519 U.S. 234 (1997) (No. 95-1595); Gov't Br. at 25 n.16, *Irving*, *supra* (No. 85-637).

As explained in the government's brief (at 50-54) in *Horne I*, *supra* (No. 12-123), although there are some aspects of the AMAA that point in that direction, the broader statutory structure supports the conclusion that compensation is available for a producer. Congress designed the AMAA to increase prices for regulated commodities (by limiting supply) and thus assumed that the scheme would *benefit* producers and would remain in effect only if producers agreed. See 7 U.S.C. 602(1); *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 346 (1984). With respect to reserve pools, Congress expressly provided that producers would obtain their pro rata share of net proceeds from sales of the reserve commodity. 7 U.S.C. 608c(6)(E). To the extent a reserve requirement might be found to constitute a taking, Congress could have expected any compensation due to be minimal or even zero, and so represent a less costly way of ensuring orderly market conditions than other forms of regulation.

There is also good reason to think that Congress would prefer that producers obtain compensation rather than an injunction prohibiting enforcement of the marketing order. The AMAA vests the Executive Branch with significant administrative authority to modify commodity regulation under the statute. See 7 U.S.C. 608c(10)(A); 7 C.F.R. 989.91. The Secretary could use that authority to respond to a just compensation award in a particular case by prospectively altering a marketing order to eliminate future takings or reduce compensation that would be due. That regulatory flexibility suggests that Congress would not have preferred the inflexible tool of an injunction foreclosing the use of reserve pools altogether—with the attendant risk of throwing the market into immediate turmoil—over a modulated administrative response.

C. Although petitioners have raised a Just Compensation Clause defense only in their capacity as handlers and so cannot *themselves* pursue a Tucker Act remedy, see *Horne I*, 133 S. Ct. at 2063, the preceding analysis defeats their defense on the merits because they contend that the marketing order effects a taking of *producers'* raisins.[13] At the outset, it is not evident that petitioners properly may assert *producers'* rights under the Just Compensation Clause as a

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[13] Petitioners have not argued that the fine independently constitutes a taking, nor does any authority support the novel proposition that the assessment of civil penalties or entry of a remedial payment order, imposed for violations of statutory or regulatory requirements, could itself constitute a taking of private property. Instead, petitioners argue (Br. 31) only that the fine may not be imposed if the marketing order authorizes an unconstitutional categorical taking of reserve raisins.

defense to liability for violating their obligations as *handlers* under the marketing order. See *Allard*, 444 U.S. at 65 n.21 ("Of course, there is no standing to assert a takings claim by those who are merely employed in selling [commodities] owned by others."). As petitioners acknowledge (Br. 7), handlers have no property interest in reserve raisins and face no economic burden from compliance with the marketing order. To be sure, handlers who flout the reserve requirement, as petitioners did, become subject to civil sanctions, 7 C.F.R. 989.166(c)—but petitioners' asserted takings defense to those penalties rests on the novel proposition that a fine for violation of the reserve requirement cannot lawfully be imposed against handlers because that requirement effects a taking of *someone else's* property. Because "a proponent of a particular legal right" generally must "assert[] his own legal rights and interests rather than basing his claim for relief upon the rights of third parties," *Rakas* v. *Illinois*, 439 U.S. 128, 139 (1978), petitioners' takings defense fails.[14]

Even if handlers could defend against sanctions imposed for failure to comply with the reserve requirement by asserting producers' rights, that de-

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[14] Petitioners produced a limited percentage of the raisins they handled, see *Horne I*, 133 S. Ct. at 2059, but *Horne I* clarified that they pursued their takings-based defense only in their capacity as handlers. *Id.* at 2060-2061. While petitioners can seek just compensation under the Tucker Act for any alleged taking of raisins they produced, they cannot circumvent that avenue by asserting a takings defense to a fine imposed on them solely in their capacity as handlers. See *Monsanto*, 467 U.S. at 1016 ("Equitable relief is not available to enjoin an alleged taking of private property * * * when a suit for compensation can be brought against the sovereign subsequent to the taking.").

fense would lack merit because the reserve requirement does not take producers' property without just compensation. As petitioners acknowledge, "[t]he constitutionality of the fine rises or falls on the constitutionality of the Marketing Order's reserve requirement." Pet. Br. 31 (citation omitted); see *Horne I*, 133 S. Ct. at 2061 n.4 ("[P]etitioners argued that they could not be compelled to pay fines for refusing to accede to an unconstitutional taking."). Because the Tucker Act supplies a procedure for producers to obtain compensation, the "alleged taking is not unconstitutional," *Virginia Surface*, 452 U.S. at 297 & n.40—and neither is the fine.[15]

Petitioners are wrong to assert (Cert. Reply Br. 11) that *Horne I* forecloses any argument that the availability of compensation under the Tucker Act for producers affects the merits of their takings defense. *Horne I* held that the Tucker Act did not create a *jurisdictional* bar to consideration of a handler's takings claim, but reserved judgment on "what impact the availability of [a producer's Tucker Act suit] would have on petitioners' takings-based defense." 133 S. Ct. at 2062 & n.7. As the Court explained, that issue

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[15] It does not matter whether producers actually *seek* compensation under the Tucker Act; rather, "all that is required is that a reasonable, certain and adequate provision for obtaining compensation *exist* at the time of the taking." *Williamson County*, 473 U.S. at 194 (emphasis added; citation omitted); see *Larson*, 337 U.S. at 697 n.18 (focusing on "the *availability* of a suit for compensation") (emphasis added). Tucker Act relief existed for producers, who "bear[] the economic burden of the program," Pet. Br. 7, even if petitioners removed any basis for filing such a suit by declining to reserve producers' raisins in defiance of the marketing order.

"go[es] to the merits of petitioners' defense, not to a court's jurisdiction to entertain it." *Id.* at 2062 n.7.

Petitioners also err in suggesting (Cert. Reply Br. 12) that the availability of compensation under the Tucker Act would "require[] [them] to pay the United States one day and then sue to get [their] money back." Because petitioners raise a takings defense in their capacity as handlers, *Horne I*, 133 S. Ct. at 2060-2061, they cannot sue for return of the money under the Tucker Act; rather, only producers may seek compensation under that Act. But because petitioners' takings defense seeks to vindicate the property rights of producers, not handlers, the availability of a Tucker Act suit for producers defeats the defense on the merits.

There is nothing inherently unfair in holding petitioners accountable for their violation of the marketing order even though the producers whose raisins they handled "received full market value for their crop and were not charged any part of the fine." Pet. Br. 13. Petitioners could have challenged the reserve requirement in several ways that would not have exposed them to monetary liability, including by filing a Tucker Act suit in their capacity as producers with respect to raisins they produced or by preemptively challenging the marketing order in their capacity as handlers under 7 U.S.C. 608c(15)(A)-(B). Instead, petitioners deliberately defied the marketing order "to obtain an unfair competitive advantage over other" industry participants "who were in compliance." Pet. App. 33a. As this Court observed in *Horne I*, "a handler who refuses to comply with a marketing order and waits for an enforcement action will be liable for significant monetary penalties if his constitutional

challenge fails." 133 S. Ct. at 2063. Petitioners chose to assume that risk.

III. IF PETITIONERS' TAKINGS DEFENSE IS NOT REJECTED ON THE MERITS, THE CASE SHOULD BE REMANDED TO CALCULATE WHAT COMPENSATION, IF ANY, COULD BE DUE

Petitioners contend (Br. 27) that, if their takings defense succeeds on the merits, "[t]he proper relief" is to reverse the fine imposed for their failure to comply with the reserve requirement. That is incorrect. Even if a taking occurred, there is no constitutional violation—and no remedy required—if the "net loss was zero." *Brown* v. *Legal Foundation of Washington*, 538 U.S. 216, 237 (2003). It would accordingly be necessary to calculate what compensation would have been due if petitioners had complied with the reserve requirement. To make that determination, it would be appropriate to consider what value all of the raisins would have had *in the absence of the marketing order*. See 68 Fed. Reg. at 41,690 (concluding that prices would be "$142 per ton higher than under an unregulated scenario" for one of the relevant years). The assessment imposed on petitioners is not an accurate reflection of that calculation; rather, it requires them to disgorge the profits they reaped by selling reserve raisins at free-tonnage prices that were supported by the rest of the industry's compliance with the marketing order.

A proper calculation of the just compensation that would have been due if petitioners had complied with the reserve requirement also would need to account for other benefits they received from the regulatory program, such as higher consumer demand for raisins spurred by enforcement of quality standards and

promotional activities. It is likely that when all benefits and alleged losses from the marketing order are calculated, petitioners would have a net *gain* rather than a net loss, given that a central point of the order is to benefit producers. *Block*, 467 U.S. at 346. Thus, if the Court concludes that petitioners' takings defense has merit, it would be appropriate to give the lower courts an opportunity to analyze that valuation issue and determine the proper fine on remand.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APRIL 2015

APPENDIX

1. U.S. Const. Amend. V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. 7 U.S.C. 602(1) provides:

Declaration of policy; establishment of price basing period; marketing standards; orderly supply flow; circumstances for continued regulation

It is declared to be the policy of Congress—

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301(a)(1) of this title.

3. 7 U.S.C. 608c(6)(E) provides:

Orders

(6) Terms—Other commodities

In the case of the agricultural commodities and the products thereof, other than milk and its products, specified in subsection (2) of this section orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section), no others:

* * * * *

(E) Establishing or providing for the establishment of reserve pools of any such commodity or product, or of any grade, size, or quality thereof, and providing for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein.

4. 7 C.F.R. 989.53(a) provides:

Research and development.

(a) *General.* The Committee, with the approval of the Secretary, may establish or provide for the establishment of projects involving marketing research and development and marketing promotion including paid advertising, designed to assist, improve, or promote the marketing, distribution, and consumption of raisins in domestic and foreign markets. These projects may include, but need not be limited to those designed to:

(1) Improve through research the accuracy of raisin production estimates;

(2) Improve through research the preparation for market, sanitation, quality, condition, storability, processing, or packaging of raisins;

(3) Ascertain through research the factors affecting acceptance of raisins by manufacturers or consumers;

(4) Promote the marketing, distribution, or consumption of raisins in domestic and foreign markets by collecting data thereon, consulting with members of the trade, and making the information available to producers, handlers, and exporters; and

(5) Promote the marketing, distribution, or consumption of raisins in foreign markets through the use of merchandising programs.

The expense of any such project relating solely to free tonnage raisons shall be paid from funds collected pursuant to § 989.80. The expense of any such project relating solely to reserve tonnage raisins shall be paid from the sale proceeds of such raisins. If any such project encompasses both free tonnage and reserve tonnage raisins, such as one which is designed to promote the consumption in export outlets of raisins generally on a long-term basis, the expense of the project may be allocated between the assessment fund and the pool fund.

5. 7 C.F.R. 989.54 provides:

Marketing policy.

(a) *Trade demand.* On or before August 15 of each crop year, the Committee shall hold a meeting to review shipment data, inventory data, and other matters relating to the quantity of raisins of all varietal types. For any varietal type for which a free tonnage percentage may be recommended, the Committee shall compute a trade demand. The trade demand shall be 90 percent of the prior crop year's shipments (converted to a natural condition weight) of free tonnage and reserve tonnage sold for free use for that varietal type, into all market outlets, adjusted by the carryin on August 1 of the current crop year and the desirable carryout for the varietal type at the end of that crop year. If the prior year's shipments were limited because of crop conditions, the Committee may select the shipments of one of the three years preceding the prior crop year. The desirable carryout shall be increased from 45,000 to 60,000 tons for Natural (sun-dried) Seedless raisins at a rate of 5,000 tons per year for three crop years following the effective date of this amended subpart. The desirable carryout for Dipped Seedless raisins shall be 1,500 tons, and for Oleate and Related Seedless raisins, 1,500 tons. The trade demand computed by the Committee shall be announced by the Committee in accordance with paragraph (h) of this section.

(b) *Preliminary percentages.* On or before October 5 of each crop year (except that the Committee may extend this date not more than five business days if warranted by a late crop), the Committee shall esti-

mate the production of any varietal type of raisins for which it has computed a trade demand. If the Committee determines that volume regulation is desirable during the crop year for that varietal type, it shall compute and announce preliminary free and reserve percentages for that varietal type: *Provided*, That such production estimate shall include by varietal type the raisins handlers are expected to acquire from producers and the total tonnage of raisins diverted under a raisin diversion program. The Committee shall compute a preliminary free percentage to release 85 percent of the computed trade demand, if it determines that a field price has been established for that varietal type, or 65 percent of the trade demand if no field price has been established. The preliminary free percentage shall be computed by multiplying the trade demand by either 85 percent or 65 percent (as the case may be) and dividing the product by the estimated production of that varietal type and rounding the resulting percentage to the nearest full percent. The difference between 100 percent and the preliminary free percentage shall be the preliminary reserve percentage.

(c) *Interim percentages.* Prior to February 15, the Committee may modify the preliminary free and reserve percentages to release less than the trade demand.

(d) *Final percentages.* No later than February 15, the Committee shall recommend to the Secretary, final free and reserve percentages which will tend to release the full trade demand for any varietal type for which preliminary or interim percentages have been

computed and announced. The difference between any final free percentage designated by the Secretary and 100 percent shall be the final reserve percentage. With its recommendation, the committee shall report on its consideration of the factors in paragraph (e) of this section.

(e) *Factors.* When computing preliminary and interim percentages, or determining final percentages for recommendation to the Secretary, the Committee shall give consideration to the following factors:

(1) The estimated tonnage held by producers, handlers, and for the account of the Committee at the beginning of the crop year;

(2) The expected general quality and any modifications of the minimum grade standards;

(3) The estimated tonnage of standard and offgrade raisins which will be produced;

(4) If different than the computed trade demand, the estimated trade demand for raisins in free tonnage outlets;

(5) If not estimated as provided in paragraph (a) of this section, an estimated desirable carryout at the end of the crop year for free tonnage and, if applicable, for reserve tonnage;

(6) The estimated market requirements for raisins outside free tonnage outlets, considering the estimated world raisin supply and demand situation;

(7) Current prices being received and the probable general level of prices to be received for raisins by producers and handlers;

(8) The trend and level of consumer income;

(9) Any prohibition of trade practices, pursuant to § 989.62 intended for the crop year; and

(10) Any other pertinent factors bearing on the marketing of raisins including the estimated supply of and demand for other varietal types and regulations applicable thereto.

(f) *Modification.* In the event the Committee subsequently deems it advisable to modify its marketing policy on any crop, because of national emergency, crop failure, or other major change in economic conditions, it shall hold a meeting for that purpose, and file a report thereof with the Secretary within 5 days (exclusive of Saturdays, Sundays, and holidays) after the holding of such meeting, which report shall show such modification and the basis therefor.

(g) *Reserve tonnage to sell as free tonnage.* On or before November 15 of the crop year, the Committee shall make two simultaneous offers of reserve tonnage to handlers to sell as free tonnage for each varietal type for which preliminary percentages have been computed and announced. One offer shall consist of a quantity equal to 10 percent of the prior year's (or the alternative year selected by the Committee pursuant to paragraph (a) of this section) shipments of free tonnage and reserve tonnage sold for free use into all market outlets to equate the current year's supply with the prior year's shipments. This offer shall be allocated to handlers on the basis of their prior year's acquisitions. The second offer, to provide for market expansion, shall consist of a quantity equal to 10 percent of the prior year's (or the alternative year select-

ed by the Committee pursuant to paragraph (a) of this section) shipments of free tonnage and reserve tonnage sold for free use. This offer shall be allocated to handlers on the basis of their prior year's shipments of free tonnage and reserve tonnage sold for free use. Each offer shall be open to handlers not more than five business days, and subsequently, two offers of any tonnage unsold in the original offers open not more than two business days each, may be made. The reoffer tonnage shall be allocated to handlers who purchase 100 percent of their allocation in preceding offers, and shall be on the basis of the quantity each handler purchased, as a percentage of the total quantity purchased by all handlers eligible to participate. At the close of the second reoffer, any remaining tonnage may be offered to handlers who purchased all of their allocations from previous offers on a first-come first-served basis and such offer shall be open to handlers for one business day. Any handler who had no shipments or acquisitions of raisins during the prior crop year will be allocated raisins under these offers on the basis of his acquisition (up to the time the original offer is made) of raisins in the current crop year. If field prices are not established, the offer shall be made not more than fifteen days following such establishment. The price of reserve tonnage raisins offered to handlers to sell as free tonnage, pursuant to this paragraph, shall be the established field price for free tonnage raisins of that varietal type, plus 3 percent of the established field price, plus the estimated costs incurred by the Committee for equity holders.

(h) *Publicity.* The Committee shall promptly give reasonable publicity to producers, dehydrators, han-

dlers, and the cooperative bargaining association(s) of each meeting to consider a marketing policy or any modification thereof, and each such meeting shall be open to them. Similar publicity shall be given to producers, dehydrators, handlers, and the cooperative bargaining association(s) of each marketing policy report or modification thereof, filed with the Secretary and of the Secretary's action thereon. Copies of all marketing policy reports shall be maintained in the office of the Committee, where they shall be made available for examination by any producer, dehydrator, handler, or cooperative bargaining association representative. The Committee shall notify handlers, dehydrators and the cooperative bargaining association(s), and give reasonable publicity to producers of its computation of the trade demand, preliminary percentages, and interim percentages and shall notify handlers, dehydrators, and the cooperative bargaining association(s) of the Secretary's action on percentages by registered or certified mail.

6. 7 C.F.R. 989.65 provides:

Free and reserve tonnage.

The standard raisins acquired by handlers which are free tonnage, and any reserve tonnage purchased for free use, may be disposed of by him in any marketing channel, subject to the applicable provisions of this part. A handler's free tonnage of a varietal type of raisin shall be either the free percentage of the standard raisins of the varietal type acquired by him or all of the standard raisins of the varietal type acquired by him if no free percentage is established by the Com-

mittee or designated by the Secretary for that varietal type. A handler's reserve tonnage of a varietal type shall be the reserve percentage of the standard raisins of that varietal type acquired by him.

7. 7 C.F.R. 989.66 provides:

Reserve tonnage generally.

(a) The standard raisins acquired by a handler which are designated as reserve tonnage and reserve tonnage transferred to a handler by the committee shall be held by him for the account of the committee and subject to the applicable restrictions of this part.

(b)(1) Each handler shall hold in storage all reserve tonnage acquired by him and all reserve tonnage transferred to him by the committee until he has been relieved of such responsibility by the committee either by delivery to the committee or otherwise. Such handler shall store such reserve tonnage raisins in natural condition without addition of moisture and in such manner as will maintain the raisins in the same condition as when he acquired them, except for normal and natural deterioration and shrinkage, and except for loss through fire, acts of God or other conditions beyond the handler's control.

(2) Reserve tonnage acquired by a handler or transferred to a handler by the committee shall be stored separate and apart from other raisins to such extent and identified in such manner as the committee shall specify in its rules and procedures with the approval of the Secretary.

(3) Each handler may, under the direction and supervision of the committee, substitute for any reserve tonnage raisins a like quantity of standard raisins of the same varietal type and of the same or more recent year's production. Each such handler shall give the committee reasonable advance notice of his intention to substitute, the exact location of the raisins for which substitution is to be made, and arrange with the committee a mutually satisfactory time for the substitution.

(4) The committee may, after giving reasonable notice, require a handler to deliver to it, or to anyone designated by it, at such handler's warehouse or at such other place as the raisins may be stored, part or all of the reserve tonnage raisins held by such handler. Reserve tonnage raisins delivered by any handler to the committee, or to any person designated by it, in the form of natural condition raisins shall in the aggregate be not more than 2 percent less than the average maturity level of all raisins such handler acquired during the applicable crop year. The committee may require that such delivery consist of natural condition raisins, or it may arrange for such delivery to consist of packed raisins.

(c) Each handler shall, at all times, hold in his possession or under his control reserve tonnage referable to his acquisitions of standard raisins and reserve tonnage transferred to him by the committee, less any quantity of such reserve tonnage released to him by a change of percentages, delivered by him pursuant to instructions of the committee or sold to him by the committee.

(d) Reserve tonnage raisins delivered by any handler to the committee, or to any person designated by it, whether in the form of natural condition raisins or packed raisins shall meet the applicable minimum grade or grade and condition standards, except for normal and natural deterioration. The committee shall have the authority to require, in its discretion and at its expense, such reinspection and certification of reserve pool tonnage raisins as it may deem necessary.

(e) In the event the committee offers to handlers reserve tonnage raisins for contract packing or for sale in export, as provided in § 989.67, each handler shall be given the opportunity to pack or purchase his share of each offer.

(f) Handlers shall be compensated for receiving, storing, fumigating, handling, and inspection of that tonnage of reserve raisins determined by the reserve percentage of a crop year and held by them for the account of the committee, in accordance with a schedule of payments established by the committee and approved by the Secretary. A box rental shall be paid by the committee to producers or handlers for boxes used in storing reserve tonnage raisins beyond the crop year of acquisition in accordance with a rental schedule established by the committee and approved by the Secretary. The handler compensation shall be reviewed annually and shall be paid, as to the amount determined to be earned and unpaid, as soon as practicable after the end of the second quarter of the crop year and quarterly thereafter. Any handler may request the committee, by registered or certified mail, at any time after June 1 of a crop year to remove or relo-

cate reserve tonnage raisins of the current crop year which remain in his possession. At any time during a crop year, a handler may request removal or relocation of reserve tonnage of a prior crop year. In each instance, he may request that the committee provide the necessary containers for any such removal or relocation. When so requested as to current crop year raisins, the committee shall make the removal or relocation, the availability of containers, storage space and time of request permitting, by September 15 of the subsequent crop year, and as to raisins of the prior crop year, within 30 days, supplying the necessary containers if so requested. If the committee removes or relocates reserve raisins of the current crop year pursuant to a handler's request, and such raisins are released to him by September 15 of the subsequent crop year, the handler shall reimburse the committee for any costs incurred by it in such removal or relocation. If any handler requests removal or relocation of reserve raisins, the committee shall immediately give notice thereof to the Secretary.

(g) The committee shall have the authority, in its discretion, to obtain loans, nonrecourse or otherwise, on any part of the reserve tonnage not subject to release as desirable free tonnage and to pledge or hypothecate the raisins on which such loans are obtained as security therefor: *Provided*, That in every such case, there shall be included in the loan agreement a provision to the effect that, in case the lender obtains possession or control of such raisins, he will dispose of them in such a manner as will not tend to defeat the objectives of this amended subpart. The net proceeds

of any such loan shall be distributed by the committee pursuant to paragraph (h) of this section.

(h) The net proceeds from the disposition of reserve tonnage raisins of any varietal type shall be distributed by the committee to the respective producers, or their successor in interest thereto, on the basis of the volume of their respective contributions to the reserve tonnage of such varietal type. Distribution of the proceeds in connection with the reserve tonnage contributed by a nonprofit cooperative marketing association which has authority to market the raisins of its members and to allocate the proceeds therefrom to such members shall be made to such association. Advance or progress payments may be made by the committee, in conformity with the provisions of this paragraph, as sufficient funds become available.

8. 7 C.F.R. 989.67 provides:

Disposal of reserve raisins.

(a) At the time the committee meets to consider free and reserve percentages for a crop year, the committee shall consider the marketing of reserve tonnage raisins for the subsequent 12–month period. The committee shall dispose of all reserve tonnage in such manner as to achieve, as nearly as may be practicable, maximum disposal of such raisins by the time reserve tonnage raisins from the subsequent crop year are available. Any reserve tonnage raisins held unsold by the committee on May 1 of the subsequent crop year shall be physically disposed of promptly in any available outlet not competitive with normal market chan-

nels for free tonnage raisins or sales of new crop reserve tonnage raisins in export: *Provided*, That, whenever the Secretary finds, based upon a recommendation of the committee, or on the basis of information otherwise available to him that because of national emergency, crop failure, an insufficient supply of reserve tonnage raisins for export, or other change of economic or marketing conditions, retention of reserve tonnage raisins carried over is warranted, the foregoing requirements as to disposal shall not apply and such raisins may be disposed of in any outlet recommended by the committee and approved by the Secretary.

(b) Reserve tonnage raisins shall be disposed of by the committee:

(1) By sale to handlers for sale in specified outlets or for resale to exporters for sale in export outlets;

(2) By direct sale to any agency of the U.S. Government for noncompetitive use;

(3) By direct sale to foreign government agencies or foreign importers in any country not listed pursuant to paragraph (c) of this section or where the procurement of raisins is so regulated as to preclude purchases from domestic handlers;

(4) By gift; and

(5) By any other means consistent with the provisions of this section, and in outlets noncompetitive with those for free tonnage raisins.

(c) The committee shall sell reserve raisins to handlers for export sale to countries on a list estab-

lished by the Secretary, on the basis of the recommendation of the committee or from other available information. The list of countries shall be reviewed by the committee annually when it reviews matters relating to the free tonnage, and shall recommend any changes in the list to the Secretary for approval. No country may be removed from the list for the purpose of permitting direct sale by the committee unless a finding is made by the committee and approved by the Secretary, that such removal and subsequent direct sale by the committee shall not lead to disruption of sale of reserve tonnage raisins by handlers in other countries on the list, and that although handlers have been able to offer reserve tonnage raisins at competitive prices to the country to be so removed, there remains an unfilled demand in such country which has not been supplied by handlers and which could be supplied by the committee at the same prices by means of direct sale.

(d)(1) Reserve tonnage raisins shall be sold to handlers at prices and in a manner intended to maximum producer returns and achieve maximum disposition of such raisins by the time reserve tonnage raisins from the subsequent crop year are available. The committee may pay the cost of transporting reserve tonnage from one handler to another and in the event a handler has more than one plant, the committee may pay the cost of transporting reserve tonnage to the handler's plant of its choice. In each offer or reoffer of reserve tonnage raisins for export, the committee may include a quantity of raisins not to exceed 2 percent of the total tonnage offered in such offer or reoffer, which it may sell to handlers whose regular allocation

provides insufficient tonnage to fill a containerized freight shipping container: *Provided*, That such sale may be made only when the remaining portion of a handler's regular allocation will fill at least 50 percent of such container and shall be made to a handler only one time in each offer or reoffer of reserve tonnage raisins. No offer or reoffer shall be made until 5 days (exclusive of Saturdays, Sundays, and holidays) have elapsed from the time it files with the Secretary complete information as to varietal type, quantity, and price involved in such offer or reoffer, and the Secretary may disapprove the offer or reoffer or any term thereof: *Provided*, That at any time prior to the expiration of the 5-day period, the offer or reoffer may be made to handlers upon the committee receiving from the Secretary notice that he does not disapprove the making of the offer or reoffer. Subject to the same conditions as are set forth in the preceding sentence with respect to the making of such offer or reoffer, the committee may withdraw an offer or reoffer to sell reserve tonnage raisins to handlers or may extend the offer or reoffer period but not when such extension would deprive one or more handlers of an opportunity to purchase raisins.

(2) Except for the final offer of the reserve tonnage from a crop year, an offer of reserve tonnage raisins for export shall provide for a specific tonnage. Each handler's share of the reserve tonnage offered prior to November 1 of any crop year shall be determined as the same proportion of the quantity offered that the free tonnage raisins acquired by him during the preceding crop year is of the free tonnage raisins acquired by all handlers during the preceding crop

year who remain handlers. If reserve tonnage raisins have been removed by the committee from a handler's premises pursuant to § 989.66(f), such handler's allocation of reserve pool offers subsequent to such removal and prior to November 1 of the following crop year shall be reduced by the percentage such removed reserve tonnage is of the total reserve tonnage acquired by such handler in the crop year. Subsequent to October 31, each handler's share shall be determined as the same proportion of the quantity offered that the free tonnage raisins acquired by the handler during the then current crop year is of the total free tonnage raisins acquired by all handlers during the then current crop year. With respect to any offer other than the initial offer, each handler's share of the total quantity offered as of that date (the then current offer plus all prior offers of that crop year) shall first be determined by the appropriate formula. His share of the current offer shall then be determined by subtracting from his share of the total quantity offered, the total of his share of prior offers from the beginning of the crop year. If any handler did not acquire raisins during the preceding crop year, the basis for his share of any quantity of reserve tonnage raisins offered prior to November 1 shall be his acquisitions of free tonnage raisins during the then current crop year. The current free tonnage acquisitions of all such new handler shall, for the purposes of determining the shares of all handlers prior to November 1, be added to the total acquisitions of free tonnage raisins during the preceding crop year of all handlers in business at the time the offer is made.

(3) With respect to any offer of reserve tonnage for sale to handlers for resale in export, the committee may provide that any such tonnage unpurchased at the end of the share reservation period will be reoffered to handlers without regard to shares and that approval for handlers' applications for purchase may be made in the same order in which the applications are received by the committee. Such reoffer may be made by the committee at the time it makes a regular offer of reserve tonnage, at any time during the period a regular offer is in effect, or within a reasonable time after a regular offer has expired.

(4) The final offer of the reserve tonnage from a crop year may be offered to handlers without regard to shares and approval of handlers' applications for purchase may be made in the same order in which the applications are received by the committee.

(5) Whenever a handler's share or allocation pursuant to this paragraph is less than or exceeds his holdings of reserve tonnage by a minor quantity, the committee may adjust the handler's share or allocation so as to avoid the cost of the physical transfer. The maximum quantity by which a handler's share or allocation may be so allocated shall be prescribed in rules and procedures which the committee shall establish with the approval of the Secretary.

(e) The committee may sell reserve tonnage raisins as provided in paragraph (b)(3) of this section only when such country is not included in the list of specified countries established pursuant to paragraph (c) of this section and may sell reserve tonnage raisins to foreign government agencies of foreign importers in

any country removed from such list. No agreement to sell reserve tonnage raisins shall be entered into by the committee until 5 days (exclusive of Saturdays, Sundays, and holidays) have elapsed from the time it files with the Secretary complete information as to varietal type, quantity, price and foreign country involved in any such proposed sale, and the Secretary may disapprove such sale or any term thereof: *Provided*, That, at any time prior to the expiration of the 5-day period, the sale may be made upon the committee receiving from the Secretary notice that he does not disapprove the making of the sale.

(f) Whenever the committee concludes that the orderly disposition of reserve tonnage would be promoted by the committee replacing any portion or all of handlers' export shipments of free tonnage raisins, to other than free tonnage outlets, made prior to the committee's first offer to sell reserve tonnage, it may do so and may specify such requirements and conditions as are necessary to carry out the replacement consistent with the objectives of this amended subpart. The committee may establish a price for such replacement tonnage which is higher, the same as, or lower than that for reserve tonnage in the first offer of the crop year. Any such replacement offer by the committee shall be governed by those provisions of paragraph (d)(1) of this section which prescribe prior action by the Secretary on committee offers to sell tonnage to handlers.

(g)(1) The committee may, subject to review by the Secretary, refuse to sell reserve tonnage raisins for export:

(i) To any handler who is in default on any previous purchase of reserve tonnage raisins from the committee;

(ii) To any handler currently not in compliance with the provisions of a sales agreement covering reserve tonnage raisins, executed by such handler with the committee; or

(iii) To any handler who signifies an intention to sell reserve tonnage to or through any person who has previously failed to complete a sale of reserve tonnage raisins to a foreign buyer and such raisins remain to be exported and remain unsold to any foreign buyer in an eligible export market.

(2) Handlers who are in default of timely payment under any purchase agreement are subject to an interest and late payment charge(s) recommended by the committee and approved by the Secretary on the delinquent amount that is owed the committee. The interest charge shall be the current prime rate plus 2 percent established by the bank in which the committee has its administrative assessment funds deposited, on the day the amount owed becomes delinquent; and further, that such rate of interest be added to the bill monthly until the handler's delinquent amount owed plus applicable interest has been paid: *Provided*, That the committee, with the approval of the Secretary, may recommend changes in the rate of interest to another rate of interest. When the committee determines to change the rate of interest or a late payment charge is needed, and such change is approved by the Secretary, the committee shall announce the change in

the rate of interest or the rate of late payment charge through a mailing by the committee to handlers.

(3) *Appeals.* If a determination is made by the committee that a handler has not complied with the provisions of this section and any actions allowed under this section are taken against the handler, such handler may request a hearing before an appeals subcommittee established by the committee. If the handler disagrees with the subcommittee's decisions, the handler may request the committee to review the subcommittee's decision. The committee may, subject to the approval of the Secretary, establish additional procedures concerning appeals.

(h) Each packer's share of an offer of reserve tonnage raisins for contract packing shall be determined as the same proportion that the reserve tonnage raisins acquired by him is of the reserve tonnage raisins acquired by all packers. In the event that any packer fails to contract for packing any or all of his share of any offer, the remaining portion thereof shall be reoffered by the committee to all packers who contracted for packing all of their respective shares, in proportion to their respective acquisitions: *Provided*, That, if such amount which packers fail to contract for packing does not exceed 250 tons, or if it is necessary to deviate from the foregoing in order to meet terms and conditions of shipment, the committee may, in its discretion, allocate such reserve tonnage raisins among packers as it deems appropriate, but the shares of packers in subsequent offers or reoffers shall be adjusted accordingly.

(i) In the event the committee determines that the applicable procedures as specified in paragraphs (d) and (h) of this section will not provide an allocation for handlers which is suitable for a particular situation, the committee, with the approval of the Secretary, may establish such modifications of procedures, consistent with § 989.66(e), as will facilitate the disposition of reserve tonnage through the handlers.

(j) The committee shall not sell reserve tonnage raisins of any varietal type to handlers to provide them with raisins to sell as free tonnage, other than as provided in § 989.54, unless it files with the Secretary complete information and receives from the Secretary notice that he does not disapprove of such sale and that because of: National emergency, crop failure; change of economic or marketing conditions; free tonnage shipments during the then current crop year exceeding shipments of a comparable period of the prior crop year by more than 5 percent: *Provided*, That, such sale of reserve tonnage shall be limited to the quantity exceeding 105 percent of shipments for the first 10 months of the prior crop year; and/or an inadequate carryover, the free tonnage outlets cannot be reasonably well supplied by the tonnage released to the industry as a whole by the committee's marketing policy for that varietal type. Any quantities of reserve raisins offered to handlers for free use, except as provided in § 989.54(g), may be offered to them on the basis of handler shipments or acquisitions in the same manner as in paragraph (d)(1) of this section. If offered on the basis of acquisitions, shares shall be determined pursuant to paragraph (d)(2) of this section. If offered on the basis of shipments, the same formula

shall be used, except that shipments shall be used as the basis instead of acquisitions in computing handlers' shares. However, such raisins shall not be sold at a price below that which the committee concludes reflects the average price received by producers for free tonnage of the same varietal type purchased by handlers during the current crop year up to the time of any offer for sale of reserve tonnage by the committee, to which shall be added the costs to the equity holders incurred by the committee on account of receiving, inspecting, storing, fumigating, insuring, and holding of said raisins, and including costs of taxes and interest: *Provided*, That, where the outlook for the next crop year or other factors have caused a downward trend in the prices received by producers for free tonnage raisins or in the prices received by handlers for free tonnage packed raisins, reserve tonnage may be sold to handlers at the currently prevailing or the approximate computed field price for free tonnage raisins, as determined by the committee. The committee may sell reserve tonnage raisins of any varietal type to any handler to provide him with raisins to sell as free tonnage if such handler has lost all or part of his free tonnage because of fire or other disaster beyond his control subject to the applicable provisions of this paragraph and in an amount equal to such tonnage so lost.

9. 7 C.F.R. 989.82 provides:

Expenses of reserve raisin operations.

The committee is authorized to incur such expenses as are reasonable and are necessary in discharging its obligations, pursuant to this part, with respect to the receiving, fumigating, handling, holding, or disposing of any quantity of reserve pool raisins held for the account of the committee. The committee is authorized to pay any taxes assessed against raisins held by or for the account of the committee on March 1, or such assessment date as later changed and then in effect, in the reserve pool established pursuant to this subpart: *Provided*, That any equity holder may pay his taxes upon giving notice to the committee on or before May 1 of each year of his intention to do so. All pool expenses shall be deducted from the proceeds obtained by the committee from the sale or other disposal of such reserve raisins held for the account of the committee.

10. 7 C.F.R. 989.91 provides:

Suspension or termination.

(a) The Secretary may, at any time, terminate the provisions of this amended subpart by giving at least one day's notice by means of a press release or in any other manner which he may determine.

(b) The Secretary shall terminate or suspend the operation of any or all of the provisions of this amended subpart, whenever he finds that such provisions do not tend to effectuate the declared policy of the act.

(c) The Secretary shall terminate the provisions of this amended subpart at the end of any crop year whenever he finds that such termination is favored by a majority of the producers who, during a representative period determined by the Secretary, have been engaged in the production for market of grapes used in the production of raisins in the State of California: *Provided*, That such majority have, during such representative period, produced for market more than 50 percent of the volume of such grapes produced for market within said State; but such termination shall be effective only if announced before July 31 of the then current crop year.

(d) The provisions of this amended subpart shall, in any event, terminate whenever the provisions of the act authorizing them cease to be in effect.

11. 7 C.F.R. 989.166(c) provides:

Reserve tonnage generally.

(c) *Remedy in the event of failure to deliver reserve tonnage raisins.* A handler who fails to deliver to the Committee, upon request, any reserve tonnage raisins in the quantity and quality for which he has become obligated (after any shrinkage allowances which may then be in effect are applied and allowances for any deterioration due to conditions beyond his control are made) shall compensate the Committee for the amount of the loss resulting from his failure to so deliver. The amount of compensation for any shortage of tonnage shall be determined by multiplying the quantity of reserve raisins not delivered by the latest

weighted average price per ton received by producers during the particular crop year for free tonnage raisins of the same varietal type or types, plus any charges already paid or credited to the handler and cost incurred by the Committee on account of the handler's failure to deliver. The weighted average price shall be determined from those sales made during the particular crop year up to the time such cash payment is requested by the Committee, or up to the end of the particular crop year, whichever date may be earlier. The amount which a handler shall compensate the Committee for any reserve raisins which have deteriorated so as to be off-grade in quality during storage for reasons within his control, shall be the latest weighted average price received by the Committee for the applicable varietal type of reserve pool raisins, less the amount actually received by the Committee in the disposition of the deteriorated raisins delivered by the handler (or the salvage value of such raisins as determined by the Committee). Any amounts paid to the Committee in satisfaction of such deficiencies shall accrue to the earnings of the applicable reserve pool. The remedies provided in this paragraph shall be in addition to, and not exclusive of, any or all of the remedies or penalties prescribed in the act for failure on the part of the handler to comply with the applicable provisions of the act or of this part.

12. 7 C.F.R. 989.401 provides:

Payments for services performed with respect to reserve tonnage raisins.

(a) *Payment for crop year of acquisition*—(1) *Receiving, storing, fumigating, and handling.* Each handler shall be compensated at a rate of $46 per ton (natural condition weight at the time of acquisition) for receiving, storing, fumigating, and handling the reserve tonnage raisins, as determined by the final reserve tonnage percentage, acquired during a particular crop year and held by the handler for the account of the Committee during all or any part of the same crop year.

(2) *Inspection.* Each handler shall be reimbursed by the Committee for inspection costs applicable to the reserve tonnage raisins, as determined by the final reserve tonnage percentage, received and held by him for the account of the Committee. Such payment shall be made at the currently applicable rate per ton paid by such handler to the Inspection Service and on the quantity reported by the handler. The Committee shall pay the cost of any inspection required by it of such reserve tonnage raisins while they are being held for its account: *Provided*, That the cost of inspection of any raisins substituted, pursuant to § 989.66(b)(3), by a handler for such reserve tonnage raisins, or which he received by transfer from another handler by purchasing, as permitted pursuant to § 989.166, a portion or all of such other handler's share of an offer, shall be borne by the handler and shall not be reimbursed to him by the Committee.

(b) *Additional payment for reserve tonnage raisins held beyond the crop year of acquisition.* Additional payment for reserve tonnage raisins held beyond the crop year of acquisition shall be made in accordance with this paragraph. Each handler holding such raisins for the account of the Committee on August 1 shall be compensated for storing, handling, and fumigating such raisins at the rate of $2.30 per ton per month, or any part thereof, between August 1 and October 31, and at the rate of $1.18 per ton per month, or any part thereof, between November 1 and July 31: *Provided*, That handlers holding 2002-03 Natural (sun-dried) Seedless reserve raisins on August 1, 2003, that are intended for use as cattle feed shall be compensated for storing, handling, and fumigating such raisins at the rate of $2.30 per ton per month, or any part thereof, between September 13 and October 31, 2003, and at the rate of $1.18 per ton per month, or any part thereof, between November 1, 2003, and July 31, 2004. Such services shall be completed so that the Committee is assured that the raisins are maintained in good condition.

(c) *Payment of rental on boxes and bins containing raisins held beyond the crop year of acquisition.* Payment of rental on boxes and bins containing reserve tonnage raisins held beyond the crop year of acquisition shall be made in accordance with this paragraph. Each handler, producer, dehydrator, and other person who furnishes boxes or bins in which such raisins are held for the account of the Committee on August 1, shall be compensated for the use of such boxes and bins: *Provided*, That persons holding 2002-03 Natural (sun-dried) Seedless reserve raisins on

September 13, 2003, that are intended for use as cattle feed shall be compensated for the use of such boxes and bins, and that no compensation shall be accrued for such raisins held between August 1 and September 12, 2003. The rate of compensation shall be: For boxes, two and one-half cents per day, not to exceed a total payment of $1 per box per year, per average net weight of raisins in a sweatbox, with equivalent rates for raisins in boxes other than sweatboxes; and for bins 20 cents per day per bin, not to exceed a total of $10 per bin per year. For purposes of this paragraph, *box* means any container with a capacity of less than 1,000 pounds, and *bin* means any container with a capacity of 1,000 pounds or more. The average net weight of raisins in each type of box shall be the industry average as computed by the Committee for the box in which the raisins are so held. No further compensation shall be paid unless the raisins are so held in the boxes on the succeeding August 1.

(d) *Payment for other services*—(1) *General.* In addition to the payments provided in paragraphs (a), (b), and (c) of this section, handlers shall be compensated for other services performed with respect to reserve tonnage raisins as set forth in this paragraph.

(2) *Transportation.* The Committee may arrange with any handler for transporting reserve tonnage raisins. Payment for such transportation shall be based on then prevailing haulage rates within the production area for the type of transportation required.

(3) *Packing.* A handler who accepts an offer by the Committee to pack reserve tonnage raisins for its account shall be compensated for such packing in an

amount determined by or acceptable to the Committee. In considering the amount of compensation to be paid, the Committee shall take into account, among other factors, the particular varietal type of raisins to be packed, the particular pack or package required, and the quantity and quality of the raisins to be packed.

(4) *Redelivery.* In the event the Committee removes reserve tonnage raisins of a previous crop year from a handler upon the request provided for in § 989.66(f) and such handler subsequently desires redelivery to him of reserve tonnage raisins for contract packing, or other purpose, he shall reimburse the Committee in advance of such redelivery for the net costs to it of the removal, storage, and redelivery of such raisins: *Provided,* That the Committee may waive payment by the handler of part or all of such costs if it determines that such waiver is reasonably necessary to the prompt and favorable disposition of the raisins involved.

Supreme Court, U.S.
FILED
APR 15 2015
OFFICE OF THE CLERK

No. 14-275

IN THE
Supreme Court of the United States

MARVIN D. HORNE, *et al.*,

Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

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April 15, 2015

RULE 29.6 STATEMENT

Petitioners have no parent corporations and no publicly held corporation owns 10% or more of their stock.

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INTRODUCTION

The government's response all but concedes the main issues in this case. The government does not disagree that a "'permanent physical occupation' ... warrants a categorical rule" of just compensation. Gov't Br. 24. The government acknowledged throughout this litigation, as recently as oral argument in this Court in *Horne I* (though now it equivocates, *id.* at 25 n.2) — that the Raisin Marketing Order is not just a physical occupation but an actual transfer of title of reserve-tonnage raisins to the Raisin Administrative Committee ("RAC"). Nor does the government disagree in principle that fines for refusal to accede to an uncompensated taking "'rise[] or fall[]'" with the taking itself. *Id.* at 47. These points of agreement should dispose of both the attempted seizure of raisins and the fines imposed on the Hornes for refusing to turn them over.

In asserting nonetheless that there is no taking, the government leaves much of the Ninth Circuit's analysis undefended. It abandons the panel's holding that the Hornes' decision to challenge the taking under the Agricultural Marketing Agreement Act ("AMAA") instead of handing over the raisins or paying the fines renders per se taking analysis unavailable. *See* Pet. Br. 27-31. It ignores the panel's theory that per se takings analysis applies only to real, and not to personal, property. Instead, it substitutes a novel argument, never before made in this litigation, that "fungible commodities" can be taken and sold by the government with less than just compensation so long as the owner is given a theoretical residual claim on some of the proceeds.

The government largely avoids the panel's theory that the RAC's appropriation of reserve raisins for its own account is a mere "use restriction," but it substitutes a broader argument that the government may demand the uncompensated transfer of private property in return for creating an "orderly market." Most of all, the government cites inapposite cases from various contexts in an attempt to make murky the clearest principle of Takings Clause jurisprudence: that when the government takes actual ownership of private property it has a categorical constitutional obligation to pay for it.

The government's alternative merits theory based on the Tucker Act was forfeited long ago, and in any event has no relevance to the Hornes, who are not seeking compensation for an accomplished taking but rather asserting constitutional defenses to an order that would be an uncompensated taking. And the government ultimately has no basis for any remedy other than that proposed by the Hornes: to reverse the USDA's enforcement order.

ARGUMENT

I. THE RAISIN MARKETING ORDER WORKS A PHYSICAL TAKING FOR WHICH JUST COMPENSATION IS CATEGORICALLY REQUIRED.

A. The Government's Novel Theories Are Inconsistent With This Court's Physical Takings Precedent.

The government does not dispute that government action which permanently deprives an owner of the right "'to possess, use and dispose of" his property and hands that right over to the United

States is a per se taking. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (quoting *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945)). Instead, the government argues the rule should not apply here "[b]ecause reserve raisins are a fungible commodity, useful to their owners only by generating revenue." Gov't Br. 27. "Unlike real property or unique personal property," according to the government, owners of raisins and other fungible commodities have little interest in "lasting possession and control" of their property. *Id.* at 17, 26-27. The government therefore claims that the "most essential property right" in the raisins and the interest that matters for Fifth Amendment purposes is "the right to receive net proceeds from the" raisins' sale, which the government believes the Marketing Order preserves. *Id.* at 23.

The devil is in the concept of "net proceeds," which finds no support in the precedents of this Court. The term presupposes that the government has sold the "fungible commodity," producing revenues. If the government remits the market value to the owner, the Fifth Amendment will be satisfied — not because there was no taking, but because there was just compensation. But the government is not free to give the commodity away, sell it for less than market value, or divert the proceeds for its own purposes, and then claim there was no taking because whatever might be left (even if nothing) is returned to the owner. That uncabined notion of "net proceeds" is simply a license to take saleable goods without just compensation.

The marketing order entails a complete transfer of ownership. As the district court explained, "[t]itle to the 'reserve tonnage' portion of the producer's raisins automatically transfers to the RAC[.]" Pet. App. 179a; *see Lion Raisins, Inc. v. United States*, 416 F.3d 1356, 1369 n.9 (Fed. Cir. 2005) ("[O]nce the raisins [a]re transferred to the RAC, [the producer] no longer ha[s] a property interest in the raisins themselves[.]"). After the transfer, the RAC has full power to sell the raisins, use them, or give them away. As the Ninth Circuit put it, the RAC gains full "possessory and dispositional control." Pet.App. 25a-26a.

The forced transfer of the reserve raisins to the RAC "chops through" and "destroys" the entire bundle of property rights, including growers' "treasured" right to dispose of raisins as they think best and to receive the full proceeds from their sale. *See Loretto*, 458 U.S. at 435. In lieu of raisins the owners receive a different species of property: a contingent pro rata interest in the pool of money left over after the RAC sells or otherwise disposes of all the reserve raisins and uses the proceeds as it sees fit. *See Lion Raisins*, 416 F.3d at 1369 n.9; 7 U.S.C. § 608c(6)(E); 7 C.F.R. §§ 989.53(a), 989.66(h). That contingent interest is legally significant only insofar as it might constitute partial compensation for the property taken. If the remittance were equal to the value of the confiscated raisins, then the Fifth Amendment would be satisfied.[1] If not, there has been an uncompensated taking.

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[1] We address below, at 13-17, the government's separate claim that the remittances in this case, even if zero, do constitute just

Fungible commodities are no different than any other form of private property. This Court has applied per se takings rules to appropriations of money, the archetypal fungible property, *see Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980); *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2600 (2013) ("[W]hen the government commands the relinquishment of funds linked to a specific, identifiable property interest ... a 'per se takings approach' is the proper mode of analysis[.]") (alteration omitted), and of water, *see Dugan v. Rank*, 372 U.S. 609 (1963). Magna Carta, the venerable precursor to the Fifth Amendment, specifically referred to corn. Magna Carta, ch. 28 (1215), *reprinted in* A.E. Dick Howard, *Magna Carta: Text and Commentary* (1964). The government's claim that no taking has occurred when it confiscates fungible commodities and remits less than their value would violate this Court's rule that when the government takes an interest in property, it does not matter that the owner might retain some of the property's economic value. *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 323 (2002). It would also effectively replace the Takings Clause's categorical compensation protections with a phantom right allowing the government to take property — or at least "fungible commodities" — with little more than a promise of *inadequate* compensation.

The government is mistaken that commodity owners have little interest in the "possession and

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compensation — a claim the Ninth Circuit rejected. Pet.App. 22a n.16.

control" of their property. Gov't Br. 27. Farmers actively and creatively seek new markets and use their wits to maximize the value of their product. A producer, if allowed to decide how to dispose of his raisins, could choose to hold back some raisins for sale next year when the producer anticipates prices will be higher. *Cf. id.* at 42. Dispositional control likewise allows a producer to target high-value markets where geography or business relationships offer a competitive advantage.

The government never acknowledges the sweeping nature of its theory. Most agricultural and commercial goods — corn, t-shirts, cars, smartphones — are in a sense "fungible" and "useful to" the businesses that deal in them "only by generating revenue." *Id.* at 27. Those goods are not unique or laden with emotional attachment. Adopting the government's rule would thus exclude almost all such goods (not to mention an array of intangible property, potentially including securities and negotiable instruments) from the Takings Clause's categorical protections. Only the relatively thin protections of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), would stand between Apple and a government demand that it give the government every third iPhone.

Equally problematic is the government's claim that a categorical taking occurs only if the government takes the most "essential" property right. Gov't Br. 23. The government does not cite any decision of this Court in a physical taking case that turned on this factor, and Petitioners are aware of none. Whenever the government "'physically takes possession of an interest in property,'" it must pay

for what it takes, even if other interests remain. *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012). The government's "most essential rights" test repeats the Ninth Circuit's error of conflating the separate categories of physical and regulatory takings. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005).

Loretto and *United States v. Causby*, 328 U.S. 256 (1946), among other cases, are irreconcilable with the government's test. The apartment building owners in *Loretto* retained the right to sell their buildings, to exclude all others from the apartments themselves, to redevelop the buildings for a different use, and to rent their units at market rates. Those are plainly the most essential property rights connected to an apartment building. Yet this Court held that a small, economically insignificant physical occupation of the building's exterior was a categorical taking requiring compensation. 458 U.S. at 438 & n.16. No one would consider the right to exclude planes from the airspace above a home to be the homeowner's most essential property right, yet this Court held the intrusion of government planes into that airspace a categorical physical taking. *See Causby*, 328 U.S. at 266. So too with the easements at issue in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), which this Court presumed would have been taken categorically if the government had condemned them. *Lingle*, 544 U.S. at 546

In support of its assertion that permanent physical deprivation of property is not a per se taking unless the owner loses the most essential or economically valuable rights, the government cites a

handful of easily distinguishable cases. The regulation in *PruneYard Shopping Center v. Robins* required the owner of a shopping center to allow demonstrators, along with other members of the public, to use common areas the owner had "open[ed] to the public" subject to reasonable time, place, and manner restrictions. 447 U.S. 74, 77, 83-84 (1980). The regulation in *Bowen v. Gilliard* required applicants for welfare benefits to assign child-support "payments to the State, which will then remit the amount collected to the custodial parent" as welfare payments "to be used for the benefit of the entire family." 483 U.S. 587, 605 (1987). Neither case involved a permanent physical deprivation of possessory and dispositional control.

The government's reliance on Indian land cases is particularly inapt. Gov't Br. 38-40. The government in those cases was acting in its capacity as trustee. By virtue of its trusteeship, the government necessarily had control over the use and disposition of the properties in question. The cases cannot be generalized into the proposition that *Penn Central* balancing applies whenever the government *seizes* possession and control of previously private property and relegates the owner to a beneficial interest in the proceeds.

B. The Government Cannot Recast The Forced Physical Transfer Of Raisins As A Voluntary Exchange.

The government adopts a version of the Ninth Circuit's suggestion that the Marketing Order is best analyzed as a "use restriction." Pet.App. 23a. But the Order does not merely tell handlers when, where, or how many raisins to sell, Gov't Br. 16-17; it transfers

possession of reserve-tonnage raisins to the RAC, which sells or donates them and spends the proceeds largely on export subsidy checks to handlers. As this Court explained in *Loretto* and *Nollan*, the government's authority to restrict use of property in commerce does not extend to compelling surrender of portions of the property to the government. *See* Pet. Br. 49-50.

The government argues that it can demand the forfeiture of property as an entrance fee to the commercial market, subject only to rational-basis review. Gov't Br. 33. According to the government, federal confiscation of reserve-tonnage raisins is a permissible condition on "voluntarily entering the commercial market for raisins." *Id.* at 29. This Court squarely rejected that contention in *Loretto*, 458 U.S. at 439 n.17; *see also Koontz*, 133 S. Ct. at 2594-95; *Nollan*, 483 U.S. at 833 n.2. The government makes no attempt to square those decisions with its argument.

The government's argument is even broader than the "nexus and rough proportionality" test applied by the panel. Under the government's theory, it could not only force raisin handlers to relinquish a third of their raisins, but require drug manufacturers to turn over every third batch of their medicines or car manufacturers to let the government drive off with every other car off the assembly line, as a condition to doing ordinary business in the market. If creation of an "orderly market" is a "benefit" the government can condition on forfeitures of property, as the government argues, *see* Gov't Br. 29, there is no end to the confiscations the government could exact.

While ignoring the contrary authorities cited in our opening brief, the government grasps for support from two inapposite cases, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), and *Yee v. City of Escondido*, 503 U.S. 519 (1992). In *Monsanto*, the Court described the revelation of trade-secret information as a "voluntary submission" in "exchange" for the benefits of pesticide registration. 467 U.S. at 1007. The limited reach of *Monsanto*, however, was made clear in *Nollan*. Just as the government tries to do now, the *Nollan* dissent argued that the government's grant of permission to improve property (in exchange for a mandatory public easement across the property) was a government benefit constituting the sort of voluntary exchange upheld in *Monsanto*. 483 U.S. at 860 n.10 (Brennan, J., dissenting). This Court refused to apply *Monsanto* so broadly, explaining that "the right to build on one's own property ... cannot remotely be described as a 'government benefit,'" and so does not allow the government to demand property as part of the bargain. *Id.* at 833 n.2.

Nor is it a "government benefit" to permit raisin growers and handlers to sell their crop. The government cannot turn the threat of prohibiting an otherwise "routine" commercial activity — selling raisins — into a bargaining chip to obtain property without paying for it. *Id.*; *see also Philip Morris, Inc. v. Harshbarger*, 159 F.3d 670, 676-77 (1st Cir. 1998). "Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them." *Koontz*, 133 S. Ct. at 2595.

The other case cited by the Government, *Yee*, involved a "rent-control ordinance" with *no* actual or threatened transfer of property to the government. Gov't Br. 30. By relying on *Yee*, the Government thus makes the same mistake the panel did in importing regulatory-takings jurisprudence into a physical-takings case. *See* Pet. Br. 18, 42. Far from "reflect[ing] the importance of voluntary action in determining whether a taking has occurred," Gov't Br. 30, *Yee* reaffirmed *Loretto* and explicitly held that *had* there been a physical transfer of property, the property owners "would have a right to compensation" and the city "might then lack the power to condition [their] ability to run mobile home parks on their waiver of this right." 503 U.S. at 531-32; *see* Pet. Br. 52-53. The Marketing Order mandates exactly the physical transfer of property that was missing in *Yee*.

The fact that raisin growers could hypothetically choose to "plant[] different crops," Gov't Br. 32, is irrelevant. The property owners in *Loretto*, *Nollan*, *Dolan*, and countless other cases of unconstitutional property exactions could all have elected different uses for their property too. If choice were relevant — outside the limited context of *Monsanto*-like "voluntary exchanges" — every one of those cases would have come out in the government's favor instead. *See Nollan*, 483 U.S. at 833 n.2. The fact that raisin growers are aware in advance of the Marketing Order makes no difference either, Gov't Br. 32, for the Government cannot reset owners' property rights simply by enacting a regulation prospectively requiring property to be handed over to the government in exchange for the government's permission to use remaining property in commerce.

The *Nollan* Court specifically rejected "the peculiar proposition that a unilateral claim of entitlement by the government can alter property rights." 483 U.S. at 833 n.2.

Nor does it matter that producers theoretically have a voice in the RAC. Gov't Br. 32. *Every* property owner has some say (through voting, direct representation, or otherwise) in the democratic processes that might lead to legislation or regulation effecting a taking. Constitutional protections are a backstop when the democratic voice fails. Moreover, even the largest agricultural cooperative in the raisin industry, Sun-Maid, representing some 650 individual raisin farmers, has been unable to persuade the Secretary to intervene with the RAC and stop this counter-productive program. *See* Compl., *Sun-Maid Growers of Calif. v. USDA*, No. 1:15-cv-00496 (D.D.C.) (filed Apr. 6, 2015). According to Sun-Maid, "the process to update, amend, and modernize the Marketing Order 'has broken down.'" *Id.* ¶ 16.

Finally, the government half-heartedly defends the panel's application of the "nexus and rough proportionality" test of *Nollan* and *Dolan*. Gov't Br. 34-35. The government asserts that a mere volume restriction would be even worse than the taking because it would render excess raisins "'economically worthless,'" *id.* at 34, but that is not true at all. Instead of seizing the reserve raisins and selling them for its own purposes, the RAC could impose timing and market restrictions on handlers, as other market orders do, allowing the owners of the raisins to keep their own raisins and reap the proceeds. If conditions turned out to be as they were in 2002-03

and 2003-04, handlers could sell the entire crop for prices not much below, and in some cases above, the field price. *See* Supp.App. 1a-2a.

C. The Order Does Not Provide Compensation To Growers.

The government spills a great deal of ink arguing that the Marketing Order is a beneficent program under which the RAC acts in the interests of producers to sell their surplus raisins at the highest possible price, thus maximizing their returns. As a matter of law, those claims are no more than a distraction. As a matter of fact, they are false.

The supposed benefits of the reserve requirement have no bearing on the legal question of whether the raisin reserve requirement constitutes a taking. *See* Constitutional & Property Law Scholars *Amicus* Br. 18-20. Insofar as the benefits of the raisin reserve could be relevant to compensation in a condemnation proceeding or in a grower's claim for damages against the United States, which would strain the special benefits doctrine past the breaking point, the question of compensation is not at issue here. *This* case involves review of an unconstitutional fine, and the proper remedy is simply to reverse. *See infra* at 20-23.

Meanwhile, the government's idealized claims of producer benefits are belied by the record, including the government's own figures. Take the 2003-04 crop year as an example. That year, the field price for raisins (the price that handlers paid to producers for free-tonnage raisins, and the amount the USDA assessed the Hornes for their undelivered reserve-tonnage raisins) was $810 per ton. Pet.App. 41a. The government's brief tells us that according to the

Secretary's econometric model, the price would have been $63 per ton less without the reserve, or $747 per ton. Gov't Br. 10. This number has no support in the record and has not previously been cited in this litigation. We believe the $63-per-ton figure is greatly inflated.[2] But accepting the Secretary's calculation for heuristic purposes, a producer of 1,000 tons of raisins in that crop year could have sold them in an unregulated market for $747,000, from which should be deducted the state mandatory advertising fee of almost $5 per ton. Under the marketing order, however, the producer could sell only 70% of his crop, yielding $567,000. *See* Supp.App. 1a (noting a 30% reserve for 2003-04). He received nothing for his reserve raisins that year, *id.*, meaning he was worse off by $175,000.[3] This, again, is under the government's *own* numbers.

Contrary to the government's account of massive oversupply, *e.g.*, Gov't Br. 10, 43, the RAC was able to sell the vast majority of the reserve-tonnage

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[2] No academic study of the Marketing Order, including the study on which the government selectively relies, Gov't Br. 5 (citing Ben C. French & Carole Frank Nuckton, *An Empirical Analysis of Economic Performance Under the Marketing Order for Raisins*, Am. J. Agric. Econ. 581, 592 (1991) ("French & Nuckton")), has found that the program increases grower profit over the long run. The government's authority, in fact, shows the opposite. *See* French & Nuckton at 592 (concluding, based on dynamic statistical model, that "grower net return ... averaged zero under the volume control program, suggesting that profits were not above normal" relative to an unregulated market, though prices were less variable).

[3] The corresponding number for 2002-03 is approximately $79,000.

raisins that year for more than the field price.[4] The RAC donated 2,312 tons to public uses like school lunches. Supp.App. 1a. It sold the remaining reserve raisins for a total of $111,242,849.17. *Id.* The RAC spent most of its total income — over $99,800,000 — on export subsidies, which benefit exporters only.[5] *Id.* It spent the rest on administrative costs, such as storage, fumigation, and transfer costs, as well as RAC expenses. *Id.* The government treats these costs as a benefit to producers, Gov't Br. 41 n.8, but when producers sell raisins to handlers, they receive the *full* field price; handlers bear their own processing and administrative costs. The result? The RAC took raisins that could have been sold in an unregulated market for $747 per ton, according to the government's own numbers, and paid producers nothing at all. *Id.*

2003-04 was a typical year in this respect. Returns to producers on reserve-tonnage raisins

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[4] Insofar as there was an oversupply, the Marketing Order may well have been the cause rather than a cure. *See* French & Nuckton at 592 (concluding that "[t]he average level of production was higher under volume control than for any of the no-control scenarios").

[5] The government asserts that export subsidies benefit producers but does not explain how. Gov't Br. 44. Export sales are part of the revenue pool for reserve raisins, but the value of that pool — zero in 2003-04 — has already been factored in. Presumably, removal of exported raisins from the domestic supply helps to prop up domestic prices, but the Secretary has already calculated the difference between domestic prices and estimated prices under an "unregulated scenario": $63 per ton. Any indirect benefit from exports is already subsumed in this figure, and should not be double-counted.

were also zero in 2005-06, 2006-07, 2007-08, and 2008-09. Pet. Br. 8-9. Although the RAC sold reserve raisins for tens of millions of dollars in every one of those years, it somehow managed to spend or give it all away.

Since 2008-09, there has been no raisin reserve even when the RAC's own econometric model has called for one, *see Sun-Maid Sends Initiative to Eliminate the Raisin Reserve*, Am. Vineyard, Jan. 2015, at 19 (noting that "[h]ad the 1949 established program been applied in 2013 for example, growers would have been compelled to put aside 37% of their crop"), yet the government points to no evidence of market disruption, oversupply, or price instability. On the contrary, growers have sold their entire crops, and the largest raisin grower cooperative has petitioned the USDA to end the reserve program altogether, pointing out that it is especially bad for smaller producers. *See* Dan Malcolm, *California Raisin Growers Benefit from Sun-Maid Work*, Am. Vineyard, Jan. 2015, at 18-19. No wonder the government relies on lofty statements of statutory purpose rather than the dismal results for producers as shown in RAC annual reports.

There is no call in this proceeding to quantify the effects of the Marketing Order (either in this Court or on remand), but to the extent the raisin reserve ever served a useful purpose, it has long since outlasted it.[6] Being outdated and counterproductive

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[6] The USDA has recognized the fact as to other agricultural programs which have been terminated in recent years. *See* Steven A. Neff & Gerald E. Plato, *U.S. Dep't of Agric., Federal Marketing Orders and Federal Research and Promotion Programs* 3 (1995); USDA, *Nectarines and Fresh Peaches*

does not make the Marketing Order unconstitutional, but the government should not be permitted to glide over actual uncompensated physical takings of property by easily-disproven claims of regulatory benefits.

The government's claim that Petitioners are seeking an "'unfair competitive advantage,'" Gov't Br. 54, and *Amicus* Sun-Maid's disparagement of the Hornes as "free riders," *see* Sun-Maid *Amicus* Br. 6, are misplaced. Marvin and Laura Horne have risked personal financial ruin in these proceedings for the purpose of breaking this archaic cartel on behalf of *all* raisin producers. They would gain the benefit of prevailing, to be sure, but bear the entire risk of failure as well. And others, including Sun-Maid's members, stand to benefit if they succeed. Sun-Maid's petition (and now lawsuit) urging the USDA to repeal the raisin reserve illustrates that they agree with that objective. They should be thanking the Hornes rather than opposing them.

II. THE GOVERNMENT'S ALTERNATIVE MERITS ARGUMENTS FAIL.

The government's assertion that the Tucker Act, which confers jurisdiction on the Court of Federal Claims to adjudicate monetary claims against the United States, *see* 28 U.S.C. § 1491(a), forecloses the Hornes' claims on the merits, requires little attention. It is foreclosed by this Court's decision in *Horne I*, is waived, and is wrong in any event.

Grown in California; Termination of Marketing Order 916 and the Peach Provisions of Marketing Order 917, 76 Fed. Reg. 66,602 (Oct. 27, 2011).

In *Horne I*, this Court concluded that Petitioners' claim is brought in their capacity as handlers as a defense to imposition of penalties in a USDA enforcement action. *Horne v. USDA*, 133 S. Ct. 2053, 2060-61 (2013). The Court held that "a takings-based defense may be raised by a handler in the context of an enforcement proceeding initiated by the USDA under § 608c(14)." *Id.* at 2063. That suffices to answer the government's argument.

To be sure, in a footnote the Court noted that a Tucker Act remedy may be available to "a *producer* who *turns over* her reserve tonnage raisins," *id.* at 2062 n.7 (emphasis added). As the government concedes, however, the Hornes are before this Court in their capacity as *handlers* who have *not* turned over raisins to the RAC. Gov't Br. 47-48 n.12. The footnote is thus irrelevant to this case.

The government's argument is also waived. The government raised the Tucker Act for the first time in this case in its response to Petitioners' 2011 petition for rehearing *en banc*, prior to this Court's review in *Horne I*. *See* U.S. Opp. to Pet. for Rehr'g at 6-8, *Horne v. USDA*, No. 10-15270 (9th Cir. Nov. 21, 2011). Although the government was entitled to raise the Tucker Act as a jurisdictional issue, it was far too late to raise new merits theories. *See Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1173 n.35 (9th Cir. 2009) (court will not consider issue raised for the first time in *en banc* petition); *see also Horne I* Tr. 28:24-25 (Kagan, J.: "[Y]our Tucker Act argument as a substantive argument, I mean, has been waived."); *id.* at 48:22-:24 (similar). Nor is the Tucker Act argument within the scope of the Questions Presented. *See Limelight Networks, Inc. v. Akamai*

Techs., Inc., 134 S. Ct. 2111, 2120 (2014); *West v. Gibson*, 527 U.S. 212, 223 (1999) (citing *Roberts v. Galen of Va., Inc.*, 525 U.S. 249, 253-254 (1999) (per curiam)); *see also* S. Ct. R. 24.1, .2.

The argument is also wrong. Congress specifically provided for appeal of USDA orders under the AMAA to the district courts, and there is no reason to think the general provisions of the Tucker Act would displace the specific provisions of the AMAA. Not only would the Hornes have to pay the full fine first and then sue to get it back — which would "make little sense" (*Horne I*, 133 S. Ct. at 2063) — but there is danger that the Court of Federal Claims would only have authority to award Petitioners compensation for the taken property, and not to reverse the unconstitutional civil penalty. That would fall short of being a full and adequate remedy. *See Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 71 n.15 (1978) (no need to pursue Tucker Act when claiming that a regulatory regime "does not provide advance assurance of adequate compensation").

Indeed, the government seems to be reverting to its standing argument, raised for the first time in supplemental briefing before the panel below, that Petitioners are complaining about the taking of "*someone else's* property." Gov't Br. 52 (emphasis in original); *see* U.S. Supp. Br. at 3-5, *Horne v. USDA*, No. 10-15270 (9th Cir. Aug. 13, 2013). Actually, Petitioners are complaining about a massive fine imposed on themselves personally, which surely they have standing to challenge. We would also remind the government that it was USDA who held that the Hornes "acquired" the raisins when they arrived at

their facility, and required the Hornes to bear the entire financial responsibility for the raisins. If this is a merits or prudential standing argument, the government forfeited it long ago, and in any event, *Horne I* permits Petitioners to challenge the entire fine in their capacity as handlers.

The upshot of the government's argument is that *even if the raisin reserve requirement is unconstitutional* — which would render monetary penalties on handlers unconstitutional in turn, *see Village of Norwood v. Baker*, 172 U.S. 269, 271 (1898); *Missouri Pac. Ry. Co. v. Nebraska*, 217 U.S. 196, 205-08 (1910) — there is no way for Petitioners to obtain relief. Gov't Br. 54. That is not what this Court held in *Horne I*.

III. THE PROPER REMEDY IS TO REVERSE.

The government's final argument is that if this Court finds that the Marketing Order effects a taking of reserve-tonnage raisins, it should remand for an accounting of just compensation. That request is puzzling on its face: Because the Hornes did not comply with the reserve requirement, no raisins or money have yet been taken. Pet. Br. 27. The accurate question is whether the fine imposed against Petitioners can survive a holding that an uncompensated taking of raisins (or their monetary equivalent) is unconstitutional.

Where property owners challenge a contemplated taking before it occurs and the regulatory regime does not contemplate compensation, the standard judicial remedy is to reverse the order that would constitute a taking, rather than to require the taking to be consummated and compensation paid. *See Dolan*, 512 U.S. 374; *Eastern Enters. v. Apfel*, 524

U.S. 498 (1988); *Hodel v. Irving*, 481 U.S. 704 (1987); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Missouri Pac. Ry.*, 217 U.S. at 205-208; *Village of Norwood*, 172 U.S. at 278. That approach in this case is most consistent with presumed legislative intent. The AMAA does not contemplate the expenditure of public funds in support of the Marketing Order, and paying for reserve raisins would defeat the purpose of the program. Under these circumstances, the proper remedy is not to remand for a calculation of compensation, but simply to reverse the order that requires an uncompensated taking.

Even if it were legally available as a remedy, the government's proposed remand would necessarily be futile. According to the government's theory, the Hornes have an obligation to disgorge the reserve-tonnage raisins processed at their facility, or their monetary value. Under the Fifth Amendment, Petitioners are entitled to compensation for any property they disgorge, likewise calculated at its monetary value. Whatever the effect of the Marketing Order on raisin prices might be, Gov't Br. 55, those two obligations are by definition equal and cancel each other out. No remand is necessary to see that Petitioners owe the government nothing.

Indeed, the USDA enforcement action underlying this case is analogous to a just-compensation proceeding in reverse. The government acted as if it were the rightful owner of the reserve-tonnage raisins processed at the Hornes' facility, and determined the monetary compensation it was due on account of the fact that Petitioners retained possession of the government's property. The USDA determined the value of the reserve raisins, and

imposed a fine precisely in that amount (plus civil penalties). The Hornes did not challenge that calculation as a measure of the value of the raisins, and it therefore stands as the adjudicated value. The government cannot now claim that the value of the raisins is something else.

Also in dispute are the civil penalties, but if the original order of uncompensated taking was unconstitutional, the fines are likewise unconstitutional. *Missouri Pac. Ry.*, 217 U.S. at 205-208. To allow imposition of civil penalties for invoking the statutory procedures to challenge an unconstitutional order would deprive Petitioners of their "right to refuse to submit to a taking where no compensation is in the offing," *Wilkie v. Robbins*, 551 U.S. 537, 583 (2007) (Ginsburg, J., dissenting).

On the penultimate page of its brief, the government proposes that on remand "it would be appropriate to consider what value *all of the raisins* would have had in the absence of the marketing order." Gov't Br. 55 (emphasis shifted). This utterly disregards the operative regulations. This action is a challenge to a USDA enforcement order under 7 C.F.R. § 989.166(c), entitled "Remedy in the event of failure to deliver reserve tonnage raisins." The regulation specifies that a handler that does not deliver reserve raisins must pay "compensation" measured by the quantity of undelivered raisins multiplied by the weighted average price received by producers for that year (*i.e.*, the field price). The regulation does not permit USDA to impose any other penalty, such as the supposed increase in market value of *other* raisins. Nor does the USDA have any inherent authority to perform such an

accounting. Although the government can cover the costs of public improvements through property assessments, *see Village of Norwood*, 172 U.S. at 278, we are aware of no authority allowing the government to simply estimate how much its acts hypothetically increased the value of property and bill owners for the difference.

The only question before the district court, and therefore the only question before this Court, is whether the order imposed on the Hornes was lawful. As the Ninth Circuit noted and the government concedes, "the constitutionality of the penalty rises or falls on the constitutionality of the Marketing Order's reserve requirement." Gov't Br. 15 (quoting Pet.App. 13a). Because the Marketing Order's reserve requirement is an uncompensated taking in violation of the Fifth Amendment, the penalty under review in this case must be reversed. Under the AMAA, there is nothing more for reviewing courts to do.

CONCLUSION

The reserve requirement is unconstitutional. This Court should so declare, reverse the court of appeals, and remand with instructions to remand to USDA to vacate fines imposed for noncompliance with the requirement to transfer reserve-tonnage raisins to the RAC.

Respectfully submitted,

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April 15, 2015

Supreme Court, U.S.
FILED
MAR 9 - 2015
OFFICE OF THE CLERK

No. 14-275

In the Supreme Court of the United States

MARVIN D. HORNE, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE CATO INSTITUTE, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, NATIONAL ASSOCIATION OF HOME BUILDERS, REASON FOUNDATION, AND SOUTHEASTERN LEGAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the government's "categorical duty" under the Fifth Amendment to pay just compensation when it "physically takes possession of an interest in property," *Arkansas Game & Fish Comm'n* v. *United States*, 133 S. Ct. 511, 518 (2012), applies only to real property and not to personal property.

2. Whether the government may avoid the categorical duty to pay just compensation for a physical taking of property by reserving to the property owner a contingent interest in a portion of the value of the property, set at the government's discretion.

3. Whether a governmental mandate to relinquish specific, identifiable property as a "condition" on permission to engage in commerce effects a per se taking.

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INTEREST OF *AMICI CURIAE*[*]

Amici are advocates for individual freedom who regard the right to keep and control one's own property as among the most vital rights in any free society and the most basic rights protected by the Constitution. See Appendix. Three of the *amici* participated in this case in its previous iteration, when this Court unanimously rebuffed the government's attempt to make property owners sue twice—once in federal district court and once in the Court of Claims—to vindicate their property rights.

INTRODUCTION AND SUMMARY OF ARGUMENT

The case is here again, this time because the Ninth Circuit has wrought a major upheaval of basic principles of takings law. The seeds of this case were sown in 1949, when the Department of Agriculture established a Raisin Marketing Order, ostensibly to smooth market fluctuations. The government's scheme conscripts raisin "handlers" to convey title to a quota of "producers'" raisins. The Raisin Administrative Committee takes title and then has unbridled discretion over the fate of its spoils. It can sell the raisins for profit, ship them to another public agency, or even give them to foreign countries.

Meanwhile, the handler must "hold in storage" the raisins "for the account of the committee" "until he

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[*] All parties have consented to the filing of this brief. In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

has been relieved of such responsibility." 7 C.F.R. § 989.66(a)-(b)(1). Once the Committee disposes of the raisins, hands out subsidies to exporting processors, and covers its administrative costs, it might have funds remaining to disburse to the farmers whose raisins were taken and who retained a contingent interest in those proceeds.

Or it might not. In 2003-2004, petitioners, the Hornes, would have been required to turn over 306 tons of raisins—30% of their crop—to USDA. In return, they would have received *nothing*. Pet. App. 41a. The year before, when they would have been required to turn over nearly half of their raisins, they would have received far less than their cost of production. Pet. Br. 7-8. Thus, a New Deal program whose raison d'être was to lift prices above "the cost of production" (Pet. App. 4a) now forces raisin farmers to fork over the (dried) fruits of their labor with no hope of even covering their expenses. Year in and year out, the Committee takes farmers' crops without providing just—or sometimes any—compensation.

The Ninth Circuit nevertheless upheld the government's scheme, citing two grounds for deeming the categorical rule of just compensation inapplicable. First, the court departed from the text and original meaning of the Fifth Amendment—and this Court's precedents—by drawing an artificial distinction between real and personal property. Under the per se rule of *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), any physical confiscation of property has always required just compensation. But according to the Ninth Circuit, the mere fact that the property here is "personal," not "real," immunizes the taking from *Loretto*'s reach.

The Takings Clause, however, makes no distinction between "real" and "personal" property—it states categorically that "private property" shall not "be taken for public use, without just compensation." U.S. Const. amend. V. Nor did *Loretto* rest on any such distinction. It held that, where the government "effectively destroys *each*" of one's "[p]roperty rights in a physical thing"—"the rights 'to possess, use and dispose of'" the property—this Court's "cases uniformly have found a taking." 458 U.S. at 435, 434.

That *Loretto* applies equally to takings of personal property is confirmed by the Takings Clause's original meaning. One of the chief ills targeted by the Clause was the practice of taking citizens' personal property to supply the military. At the time of the Founding, it would have been inconceivable that the Fifth Amendment did not make citizens' own crops forbidden fruit.

The Ninth Circuit's distinction not only conflicts with this Court's precedents and the constitutional text, it also lacks any economic basis and favors those with the means to become landowners over those who lack such means. The Hornes would have lost all right to possess, use, and dispose of their own property. It is constitutionally irrelevant that the property is a ton of raisins grown on their farm, rather than the farm itself.

Second, the decision below authorizes the government to flout its constitutional obligation to provide just compensation merely by providing a future, contingent interest that may well prove worthless. By that court's lights, *Loretto*'s per se rule is inapplicable whenever the government preserves the theoretical possibility of a payout from its use of the taken

property—even if, as here, the payout never materializes or it amounts to less than the owners' cost of producing the property in the first place. The government attempts to justify this result on the ground that the property owners share in the public benefits supposedly produced by the taking, effectively reducing the Takings Clause to a form of rational-basis-style "legitimate purpose" review.

By permitting the government to avoid *Loretto*'s per se rule merely by offering a contingent interest that could be utterly worthless, the Ninth Circuit opened the door to procedural gamesmanship that threatens to send property rights the way of the California Raisins. The court found it persuasive that the government scheme was "carefully crafted to ensure the [owners] are not completely divested of their property rights" in the sense that they retain the right to an "equitable distribution," albeit one that "may be zero." Pet. App. 18a, 21a. But this mistakes the problem for the solution. *Any* government action can be joined with some trivial, contingent right. Surely the government may not seize our cars to deliver the mail and avoid paying just compensation by allowing us to use them on Sundays.

Nor, obviously, is the fact that mail would be delivered to our homes Monday through Saturday—our bit of the public benefit—sufficient to avoid a per se taking. Yet that is exactly what the government argues in suggesting that the Hornes' enjoyment of the supposed benefits of collectivization is a "contingent interest" sufficient to avoid *Loretto*.

By devaluing property rights of all sorts, the government's approach would weaken the values of autonomy and reliance that undergird the Takings

Clause and our constitutional order. James Madison could have been speaking directly to the court below when he admonished: "Government is instituted to protect property *of every sort*," and "the end of government * * * is a *just* government, which *impartially* secures to every man, whatever is his *own*." James Madison, *Property*, Nat'l Gazette, Mar. 27, 1792, reprinted in 14 The Papers of James Madison 266 (Robert A. Rutland et al. eds., 1983) (first emphasis added).

The Ninth Circuit's decision radically shrivels the right to own property—in a manner that departs from the precedents of this Court, the nation's founding ideals, and the Constitution. Its judgment should be reversed.

STATEMENT

1. Much-criticized relics of the New Deal, agricultural marketing orders administered by the United States Department of Agriculture (USDA) continue to control the supply of many agricultural products today. In theory, these orders are designed to prevent "unreasonable fluctuations in supplies and prices." 7 U.S.C. § 602(4). In reality, the orders create government-enforced cartels that give bureaucrats carte blanche both to fine farmers who sell more than their allotted quotas and to drive up prices for consumers. See generally Thomas M. Lenard & Michael P. Mazur, *Harvest of Waste: The Marketing Order Program*, Regulation (May/June 1985).[1]

2. This case involves the USDA's marketing order for raisins, which "effects a direct transfer of title of a producer's 'reserve tonnage' raisins to the govern-

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[1] Available at www.cato.org/pubs/regulation/regv9n3/v9n3-4.pdf.

ment." *Evans* v. *United States*, 74 Fed. Cl. 554, 558 (2006). Under that order, handlers of raisins must reserve a certain portion of the producers' crop, which they may not sell on the open market. USDA annually establishes the amount to be reserved, based on the recommendations of a committee of 46 industry representatives and one representative of the public. 7 C.F.R. §§ 989.26, 989.29-30, 989.35-36.

The reserve-tonnage raisins must be physically segregated from the rest of the farmer's crop and held "for the account" of the Committee, which takes title. *Id.* §§ 989.65, 989.66(a), (b)(1), (b)(2), (g). After the Committee disposes of the raisins and covers its expenses, "[w]hatever net income remains [if any] is disbursed to" the farmers who grew the raisins and were forced to turn them over. Pet. App. 6a (citing 7 C.F.R. § 989.66(h)).

The Committee's central planning has been less than stellar. After "allegations that members of the Raisin Administrative Committee engaged in illegal price-fixing and market division discussions with foreign producers," the USDA amended the marketing order to prohibit such conduct. Daniel Bensing, *The Promulgation and Implementation of Federal Marketing Orders Regulating Fruit and Vegetable Crops Under the Agricultural Marketing Agreement Act of 1937*, 5 San Joaquin Agric. L. Rev. 3, 20 (1995). The Committee does consumers no favors either: its creation of "artificial raisin-scarcity * * * drives up prices," with the paradoxical result "that Californian raisins are sometimes cheaper abroad than they are in California." *Why does America regulate the trade in raisins?*, The Economist (Apr. 14, 2013).[2]

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[2] Available at http://econ.st/1C60qXK.

3. The Hornes are farmers in Fresno and Madera Counties. During the relevant years, 2002-2003 and 2003-2004, the Hornes did not set aside the mandated reserve-tonnage raisins. As they explained to the Committee, they believed they had a "right[] under the Constitution" not to "relinquish ownership of [their] crop" to the government. Pet. App. 129a-130a. The government disagreed. It initiated an administrative enforcement action against the Hornes, and the USDA ultimately found them liable for failing to give up their raisins. Pet. App. 8a.

4. The Hornes sought relief in federal court. Pet. App. 8a. After the district court granted summary judgment to the USDA, the Hornes appealed to the Ninth Circuit, which initially held that no taking had occurred because the marketing order "applies to the Hornes only insofar as they voluntarily choose to send their raisins into the stream of interstate commerce." Pet. App. 208a. But when the Hornes sought rehearing, the Ninth Circuit changed its tune, abandoning its modern iteration of the right-privilege distinction and deciding it lacked jurisdiction over the Hornes' takings claim.

This Court unanimously reversed. The Court held that the Ninth Circuit had "jurisdiction to decide whether the USDA's imposition of fines and civil penalties on petitioners, in their capacity as handlers, violated the Fifth Amendment." Pet. App. 258a. The Court remanded the case so that, as Justice Kagan put it, the Ninth Circuit could "figure out whether this marketing order is a taking or * * * just the world's most outdated law." Transcript of Oral Argument at 49, *Horne* v. *Dep't of Agric.*, 133 S. Ct. 2053 (2013) (No. 12-123).

5. On remand, the same panel again ruled that the Committee's seizure of the raisins is not a compensable taking. The court cited two reasons—neither of them advanced by the government—why the per se rule requiring compensation for physical confiscations of property does not apply.

First, without discussing the text of the Fifth Amendment, the court announced that "the Marketing Order operates on personal, rather than real property," and that "the Takings Clause affords less protection to personal than to real property." Pet. App. 18a. Second, the court reasoned that the Hornes retain a "contingent interest" in the proceeds from their raisins, so they "are not completely divested of their property rights." *Ibid.*

The panel acknowledged that "the equitable distribution" from the Committee "may be zero," but it "is not zero in every year" (Pet. App. 21a)—at least, not for those who participate year after year. Even when it is, that is only because "it just so happens that in those years" the Committee's "gross proceeds are not greater than [its] operating expenses." *Ibid.* In any event, the taken raisins "continue to work to the Hornes' benefit" because USDA uses them "to stabilize market conditions." Pet. App. 21a-22a.

ARGUMENT

I. The Ninth Circuit wrongly limited *Loretto* to real property.

Where the government effects "a permanent physical occupation of property," this Court's "cases uniformly have found a taking." *Loretto*, 458 U.S. at 434. Here, the government "effectively destroy[ed] *each*" of the Hornes' "[p]roperty rights in a physical thing"—"the rights 'to possess, use and dispose of'" their rai-

sins. *Id.* at 435. Departing from this Court's precedents and the text and original understanding of the Fifth Amendment, the Ninth Circuit held that *Loretto* does not "govern controversies involving personal property." Pet. App. 20a. That decision must be reversed.

A. This Court has explicitly recognized that *Loretto* applies to both real and personal property.

1. This Court has never held that *Loretto*'s per se rule is limited to real property. *Loretto* itself states no such rule: As the Ninth Circuit admitted, "the *Loretto* Court did not have occasion to consider the occupation of personal property." Pet. App. 20a. In fact, "the actual holding of *Loretto* makes no mention of a distinction between real and personal property, nor was any rationale given in the opinion that might justify such a distinction." *Nixon* v. *United States*, 978 F.2d 1269, 1284 (D.C. Cir. 1992).

To support its distinction between real and personal property, the Ninth Circuit relied instead on a "later discussion of personal property in *Lucas*," where this Court observed in dictum that, "'in the case of personal property,'" the government has a "'traditionally high degree of control.'" Pet. App. 18a-20a (quoting *Lucas* v. *S.C. Coastal Council*, 505 U.S. 1003, 1027-1028 (1992)). This passage, the court reasoned, shows that there is "no reason to extend *Loretto* to govern controversies involving personal property." Pet. App. 20a. The court below was mistaken.

First, *Lucas* did *not* involve a "physical invasion" of property (505 U.S. at 1015)—the type of taking at issue here and in *Loretto*. USDA wishes to physically take possession of the Hornes' raisins. *Lucas*, by con-

trast, dealt with the distinct situation "where regulation denies all economically beneficial or productive use of land." *Ibid.* The Marketing Order does not merely diminish the value of the Hornes' property, or foreclose certain uses thereof. Rather, the government would outright take title to that property for a public use while refusing to pay for it.

Put simply, regulatory-taking rules are irrelevant. The panel's treatment of a "regulatory taking" case such as *Lucas* as "controlling" in a "case[] involving physical takings" ignored a "longstanding distinction" between the two and was "inappropriate." *Tahoe-Sierra Pres. Council* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302, 323 (2002) (internal quotation marks omitted); Pet. Br. 39-42.

Second, this Court has already recognized that *Loretto does* apply to personal property. A decade after *Lucas*, the Court analyzed the government's forced "transfer of the interest" in lawyers' trust accounts—*personal* property—under the "*per se* approach," finding that it was "akin to the occupation" of property "in *Loretto*." *Brown* v. *Legal Found. of Wash.*, 538 U.S. 216, 235 (2003) (citing *Phillips* v. *Wash. Legal Found.*, 524 U.S. 156, 172 (1998)).

The Ninth Circuit's approach cannot be reconciled with this Court's decision in *Brown*. If intangible and fungible property like earned interest on a trust fund is subject to *Loretto*'s categorical rule, then surely "physical thing[s]" like raisins—which can literally be "possess[ed], use[d] and dispose[d] of"—fall under its protection. *Loretto*, 458 U.S. at 435 (internal quotation marks omitted). Indeed, such "physical appropriations * * * represent a *greater* affront to individual property rights." *Tahoe-Sierra*, 535 U.S. at 324

(emphasis added). Thus, it is no surprise that other circuits to consider this issue have uniformly recognized that the per se takings doctrine extends to both real and personal property.[3]

2. Remarkably, not only did the Ninth Circuit ignore *this* Court's logic in *Brown*, it quoted its *own* contrary reasoning from the same case: "'[t]he per se analysis has not typically been employed outside the context of real property.'" Pet. App. 20a (quoting *Wash. Legal Found.* v. *Legal Found. of Wash.*, 271 F.3d 835, 854 (9th Cir. 2001) ("*WLF*") (en banc), *aff'd sub nom.*, *Brown*, 538 U.S. 216). The panel neglected that, although this Court affirmed the *judgment* in *Brown*, it *rejected* the Ninth Circuit's takings analysis. This Court "agree[d]" with "the *dissenters*," who "likened" the government's confiscation of earned interest "to the kind of '*per se*' taking that occurred in *Loretto*." *Brown*, 538 U.S. at 235 (emphasis added).

As those dissenters recognized, the "argu[ment] that the per se approach of *Loretto* and similar cases

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[3] See *Nixon*, 978 F.2d at 1284 (rejecting the "argu[ment] that the per se takings doctrine applies only to * * * real property" as "fail[ing] for want of authority or logic"); *Warner/Elektra/Atl. Corp.* v. *Cnty. of DuPage*, 991 F.2d 1280, 1285 (7th Cir. 1993) ("American governments" "have to pay just compensation" when they "requisition personal property"); *Anderson* v. *Spear*, 356 F.3d 651, 668-669 (6th Cir. 2004) (state's "disgorgement" of campaign funds "constitutes a *per se* taking"); *Porter* v. *United States*, 473 F.2d 1329, 1333 (5th Cir. 1973) (per se test applied to "commonplace items of personal property"); *United States* v. *Corbin*, 423 F.2d 821, 826 (10th Cir. 1970) (per se test applied where "the Government took possession of * * * fish"); see also *Rose Acre Farms, Inc.* v. *United States*, 373 F.3d 1177, 1196 & n.17 (Fed. Cir. 2004) ("reject[ing] the * * * contention that a 'per se' takings analysis is never applicable when personal property is at issue").

applies primarily to takings of real property * * * is not true." 271 F.3d at 866 (Kozinski, J., dissenting). After all, "if the city wants to display your Renoir in its museum, it can't just take it and compensate you with the joy of viewing it during visiting hours." *Ibid.* For raisin farmers in California, the deal is even worse. If the Ninth Circuit is right, the government can take your Renoir, send it back to France, and, after pocketing the change to cover its own budget, give you absolutely nothing.

That dangerous reasoning is an affront to this Court's precedent and to the ideals of private property on which the nation was founded. The judgment below should be reversed.

B. The Fifth Amendment equally protects real and personal property.

Limiting *Loretto* to real property would be fundamentally inconsistent with the text and original meaning of the Takings Clause. When interpreting the Constitution, this Court looks first to the "[n]ormal meaning" of the constitutional text as "known to ordinary citizens in the founding generation." *District of Columbia* v. *Heller*, 554 U.S. 570, 576-577 (2008). The Takings Clause refers simply to "private property"; its text does not distinguish between real and personal property. And the available evidence of the Clause's original meaning points to its application to both types of property. See Pet. Br. 36-39.

There exists essentially only one "contemporaneous statement of why the clause was passed," which came from legal educator and jurist Henry St. George Tucker. William Michael Treanor, *The Original Understanding of the Takings Clause and the Political*

Process, 95 Colum. L. Rev. 782, 836 (1995). As St. George Tucker explained, the Clause "was probably intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practised during the revolutionary war, without any compensation whatever." 1 Henry St. George Tucker, Blackstone's Commentaries app. 305-06 (Philadelphia, Birch & Small 1803). Indeed, the "widespread reaction against military confiscation of personal property" was a primary "motive" for the adoption of the Clause. Treanor, *supra*, at 855.

Other scholars agree that the Clause, as originally understood by the Founding generation, extends to both real and personal property. "[T]he appropriation of private property to supply the army during the Revolutionary War" was a "paradigm case" of uncompensated takings that the Clause was intended to forbid. Jed Rubenfeld, *Usings*, 102 Yale L.J. 1077, 1122 (1993). "The Founders meant for the Takings Clause to remedy not so much the taking of real property as the taking of personal property by * * * troops." Tom W. Bell, *"Property" in the Constitution: The View from the Third Amendment*, 20 Wm. & Mary Bill Rts. J. 1243, 1260 (2012). Given this motivation, it is "unlikely that the uncompensated taking of personal property was somehow less offensive to the Framers than the uncompensated taking of land." Eduardo Moisès Peñalver, *Is Land Special? The Unjustified Preference for Landownership in Regulatory Takings Law*, 31 Ecology L.Q. 227, 249 (2004).

In short, the history of the Fifth Amendment's Takings Clause confirms that it was understood to mean exactly what its text says—that it protects all types of "private property," without qualification.

C. There is no principled distinction between government confiscation of real and personal property.

Besides lacking support in this Court's precedents and the Fifth Amendment's text and original meaning, distinguishing between real and personal property makes no sense economically. Regardless of the property's uniqueness or "sentimental value," only the "market value" of taken property is compensable. *WLF*, 271 F.3d at 866 (Kozinski, J., dissenting). "For purposes of the Takings Clause," therefore, both "real and personal property are reduced to their cash equivalents." *Ibid.*

That value, moreover, is measured exactly the same way for real property as it is for personal property. "[T]en acres of undeveloped land in rural Maine is not as valuable as ten acres of undeveloped land in midtown Manhattan," because "people are willing to pay a higher price for access to Manhattan." *Philip Morris, Inc.* v. *Reilly*, 312 F.3d 24, 51 (1st Cir. 2002) (Selya, J., concurring). "If the physical thing itself were the basis of value, these tracts of equal size and topographical characteristics [w]ould be worth the same." *Ibid.* But no one pretends that they are, or that land is any less commercialized or fungible than any other property. "Limiting per se takings analysis to cases involving real property is" thus "a crude boundary with no compelling basis" in economics or "the law." *Ibid.*

If allowed to stand, the Ninth Circuit's unprecedented view of the Takings Clause "will doubtless be greeted with a rousing cheer by government officials who will eagerly" seize personal property—including "bank accounts and other places where money is

kept"—all while easily "justifying it with some sort of 'ad hoc' analysis." *WLF*, 271 F.3d at 866 (Kozinski, J., dissenting). This Court should reverse.

II. The Ninth Circuit's approach would encourage the government to engage in procedural gamesmanship to avoid *Loretto*'s per se takings rule.

Apart from its artificial distinction between real and personal property, the Ninth Circuit refused to apply *Loretto* because "the Hornes retain the right to the proceeds from" the Committee's disposition of the raisins, so their "rights with respect to the reserved raisins are not extinguished." Pet. App. 21a. True, "the equitable distribution may be zero," but that is only because "it just so happens that in those years" the Committee has no net revenue. *Ibid.* Thus, the Ninth Circuit held, "the Hornes did not lose all economically valuable use of" their raisins, and *Loretto* does not apply. Pet. App. 20a. Instead, because the Hornes retained some "residual value after the regulation's application," the court applied "the ad hoc framework" of *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104 (1978). Pet. App. 22a n.17, 16a.

Permitting the decision below to stand would have negative consequences for all types of property rights. The Ninth Circuit's rationale extends to confiscations of both personal and real property. It would allow the government to avoid *Loretto* simply by giving inadequate—or purely theoretical—compensation to those whose property is taken. Just as problematic, the decision below counts the claimed benefits that purportedly flow from the government's use of the taken property as an adequate contingent interest.

That cannot be the law. If it were, it would undermine core property rights and lead to the vast majority of takings being analyzed only under *Penn Central*'s highly deferential balancing test.

A. Under the government's proposed rule, it could manipulate the standard of review by offering an illusory contingent interest.

According to the Ninth Circuit, the government may avoid paying just compensation simply by giving property owners some contingent interest in their taken property. Under this reasoning, the per se takings rule would collapse; it would apply only when a particularly uncreative government body forgets to provide the property owner a meaningless remainder interest. After all, every regulation could easily be, in the Ninth Circuit's words, "carefully crafted to ensure the [property owners] are not completely divested of their property rights"—especially if it is quite alright that "the equitable distribution" from the interest "may be zero." Pet. App. 18a, 21a.[4]

The dangers of this Kafkaesque rule extend to all types of property. The Ninth Circuit considered its imaginary contingent interest rationale for avoiding *Loretto* "independent" from its mistaken distinction between real and personal property. Pet. App. 17a-18a. Thus, a government seeking to build a new highway through private property might avoid the per se rule by leaving the property owners a contin-

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[4] The Ninth Circuit's approach makes even less sense in light of the fact that "just compensation" requires "a full and perfect equivalent for the property taken." *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 326 (1893).

gent interest in highway funds—just as the Post Office, desiring to seize vehicles for mail delivery, might avoid that rule by leaving the vehicles' owners a contingent interest in mail-related revenues. And since the government can decide the scope of the contingent interest, there is every reason to expect that the interest will, as the Ninth Circuit says, "just so happen[]" to be worthless. Pet. App. 21a.

Were the Ninth Circuit's destructive rule correct, this Court's past takings cases should have come out the other way. The seizure of coal mines in *United States* v. *Pewee Coal Co.* would not have required the government "to pay just compensation," had it simply reserved to the mine's former owner a theoretical interest in the mine's production. 341 U.S. 114, 117 (1951) (plurality). And the disruptive flights directly over a home and farm in *United States* v. *Causby* could have been "balanced" into a non-compensable taking if only the government had offered a token portion of airport net revenues to the homeowner. 328 U.S. 256, 265 (1946). In short, the government's and the Ninth Circuit's approach would, apart from the rarest example of a government forgetting to reserve a parchment interest, eviscerate the per se takings rules.

B. The Ninth Circuit's decision permits the government to avoid the per se rule merely by characterizing diffuse public benefits as "contingent interests."

Permitting governments to manipulate the standard of review by leaving the property owner a meaningless contingent interest is bad enough. But the Ninth Circuit went further. By its lights, *Loretto*'s per se rule does not apply because "even in years in

which producers receive no equitable distribution," the Hornes' interest "funds the administration of an industry committee" that allegedly "ensures the reserved raisins continue to work to the Hornes' benefit after they are diverted to the" Committee. Pet. App. 21a-22a. The Committee would use the funds from the Hornes' property to "represent[] raisin producers" and supposedly "stabilize the field price of raisins." Pet. App. 21a.[5] In other words, because the government knows how to use raisins better than the Hornes do (if only they understood!), the Hornes have a continuing contingent interest sufficient to avoid the per se rule. Once again, this collectivist view of property is foreign to the Fifth Amendment.

It is no exaggeration to say that, if this view became law, the following scheme would be judged, not under *Loretto*, but only under *Penn Central*'s far weaker balancing test: The government forms a Land Administrative Committee, which has the power to take 50 percent of all real property and direct its use. The (former) property owners must keep the land "for the account" of the Committee. The owners receive no compensation. Instead, the government puts the land to a "better" use and provides, say, lower taxes, or some other diffuse public benefit to the owners (accepted as true in court on the government's say-so). Under the government's and the Ninth Circuit's view, this is not a per se taking.

That cannot be right. As the Hornes put it, farmers may not lawfully be required to "relinquish ownership of [their] crop"—they "put forth the money and

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[5] All these "benefits" with "no federal funding," says the Ninth Circuit (Pet. App. 6a)—as if this scheme were *more* constitutional because it runs on confiscated property rather than taxes.

effort to grow it, not the Raisin Administrative Committee. This is America, not a communist state." April 23, 2002 Letter from the Hornes to the Secretary of Agriculture and the Raisin Administrative Committee (Pet. App. 129a-130a).

Of course, one need not collectivize half the private property in America to see the flaws of the government's and the Ninth Circuit's approach. Take *Loretto* itself. This Court found a per se taking there because there was "a permanent physical occupation of property." *Loretto*, 458 U.S. at 441. But if the Ninth Circuit were right, the government could easily have manipulated the applicable standard, avoiding the per se rule. All it needed to do was tell the Court that, even if the property owners were too obtuse to realize it, they "benefited" from the government taking their property to install cable by the improvement of the nationwide communications system, the resulting increase in educational and entertainment programming, and ultimately a richer cultural milieu. Thus, the "disposition" of the owners' property "inure[d] to [their] benefit." Pet. App. 22a.

Such arguments could be made for any taking. For instance, "even the family that gets booted from its home to make room for a freeway will get the benefit of a much faster commute from the park bench whence it must take up residence." *WLF*, 271 F.3d at 866 (Kozinski, J., dissenting). "In a complex world, a property owner will always get *some* benefit, real or theoretical, from a taking of his property." *Ibid.*

As it turns out, an argument akin to the government's here was made in *Loretto*—and rejected. As the Court explained, even if the taking "serve[d] the legitimate public purpose of 'rapid development of

and maximum penetration by a means of communication which has important educational and community aspects,'" that "is a separate question" from whether a taking occurred. 458 U.S. at 425. "[A] permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." *Id.* at 426.

If the government and the ruling below are right, then *Loretto* is wrong. Indeed, many of this Court's taking cases must be wrong. "[T]he physical taking of *any* property by the government * * * is a compensable taking, even if the property owner gets an offsetting—or even a net—benefit." *WLF*, 271 F.3d at 866 (Kozinski, J., dissenting). Regardless of "the wisdom" of the government's policy, where that policy "transfer[s] an interest in property from the landowner to the government," it "amount[s] to a per se taking." *Koontz* v. *St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2600 (2013). As Justice Holmes put it long ago: "[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pa. Coal Co.* v. *Mahon*, 260 U.S. 393, 416 (1922).

C. Evisceration of the per se takings rule would undermine property ownership, autonomy, and reliance interests.

1. By making it easy for governments to avoid the per se takings rule, the decision below would undermine the foundational values of American property law. The Fifth Amendment embodies the principle that property rights are central to a free people and a just government. Property cannot be taken without

"due process"; and when it is taken, the government must pay "just compensation." U.S. Const. amend. V.

These guarantees reflect the many values inherent in private property. They promote individual achievement, privacy, and autonomy from government intrusion. *Loretto*, 458 U.S. at 436 ("[P]roperty law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property."). They also protect settled expectations and reliance interests. Moreover, they foster equal treatment under the law by barring the government "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960). But under the Ninth Circuit's decision, most takings would be assessed only under the malleable *Penn Central* standard. Applying that standard broadly would provide scant protection to core property rights.

As this Court has recognized, "[t]he traditional rule" embodied by *Loretto* "avoids otherwise difficult line-drawing problems." *Loretto*, 458 U.S. at 436. Since *Penn Central*, the Court has expressed discontent with that decision's "'essentially ad hoc, factual inquir[y].'" *Koontz*, 133 S. Ct. at 2600 (quoting *Penn Central*, 438 U.S. at 124). In *Koontz*, the Court declined to apply, "much less extend that 'already difficult and uncertain rule'" to a monetary exaction. *Ibid.* (quoting *E. Enters.* v. *Apfel*, 524 U.S. 498, 542 (1998) (Kennedy, J., concurring in the judgment and dissenting in part)). Indeed, the question of when a taking occurs under *Penn Central* is "among the most litigated and perplexing in current law." *E. Enters.*, 524 U.S. at 541 (Kennedy, J.).

2. The central weakness in *Penn Central*'s three-factor balancing test is that it is readily susceptible to manipulation. Whether a taking occurs depends on a balancing of: (1) the regulation's "economic impact" on the property owner; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action." 438 U.S. at 124. Those factors are not amenable to being applied consistently—and should not be extended beyond regulatory takings, to actual physical takings.

The first factor examines the economic impact on the property owner. Which way this factor points depends on how the impact is characterized. A court sympathetic to a taking can easily invoke the "bundle of rights" concept and frame the taking as one that removes only a couple twigs from the bundle—as the Ninth Circuit did here. Pet. App. 18a, 20a; see Eric R. Claeys, *The* Penn Central *Test and Tensions in Liberal Property Theory*, 30 Harv. Envtl. L. Rev. 339, 357 (2006). By contrast, courts less sympathetic to the government can "construe[] the owners' interest much more broadly," often by characterizing the right taken as one of the bundle's more significant sticks. *Id.* at 361.

The second factor focuses on "investment-backed expectations." But this phrase obscures more than it illuminates. As Professor Richard Epstein has observed, "we should be deeply suspicious of the phrase 'investment-backed expectations' because it is not possible to identify even the paradigmatic case of its use." Richard A. Epstein, Lucas *v.* South Carolina Coastal Council*: A Tangled Web of Expectations*, 45 Stan. L. Rev. 1369, 1370 (1993). If the phrase is supposed "to convey the idea that property is protected

only where it has been acquired by purchase or labor, then it is clearly inaccurate": "The government cannot take property from a donee anymore than it can take it from a buyer." *Ibid.* And this factor can swing either way depending on whether the court chooses to frame the property interest in commercial terms.

The third factor, the character of the government action, is likewise unpredictable and easily manipulated. If a court characterizes the government action "by focusing on the invasiveness of the regulation," this factor will point toward a taking. Claeys, *supra*, at 357. But if the court "tak[es] at face value the purposes for which the government professed to act" and gives these purposes "close to rational-basis deference," this factor will point the other way. *Ibid.* "Whether one or the other of the competing characterizations will come to one's lips in a particular case depends primarily upon one's evaluation of the worth of competing uses of real estate." *Lucas*, 505 U.S. at 1025.

3. *Penn Central*'s malleability erodes the values served by the protection of private property, creating uncertainty at the public's expense. Citizens "will not be able to make informed choices" about their property if the Court does not apply "clear standards to determine when compensation will be paid." Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 Colum. L. Rev. 1697, 1700 (1988). Because the Takings Clause "is an attempt to reconcile an unpredictable, democratically responsible polity with the existence of a capitalist economy based on private property and individual initiative," ad hoc takings rules "introduce[] an element of uncertainty into private investment decisions that could make the

coexistence of democracy and private property more, rather than less, difficult." *Id.* at 1701-1702.

Further, unpredictable standards tend to destroy "the appearance of equal treatment." Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1178 (1989). Because *Penn Central*, "with its lack of objective criteria, does not impart knowledge of the legal rights and obligations of either property owners or public officials," its application has "result[ed] in protracted litigation and arbitrary outcomes." Steven J. Eagle, *The Four-Factor* Penn Central *Regulatory Takings Test*, 118 Penn St. L. Rev. 601, 605 (2014).

The per se framework produces fairer and more predictable results than *Penn Central*, and it should generally be favored by the law. Under the decision below, however, the per se rule would rarely apply. Whenever the government offered some contingent interest in the taken property—even if that interest was worthless or had value only in the government's eyes—there would never be a per se taking. Instead, *Penn Central* would apply, permitting property rights of all sorts to be "balanced" away. To preserve the core protection of the Takings Clause, the Ninth Circuit's decision must be reversed.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted.

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APPENDIX

APPENDIX: LIST OF *AMICI CURIAE*

The *Cato Institute* was established in 1977 as a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs, including in various cases concerning property rights. This case is of central concern to Cato because it implicates the safeguards the Constitution provides for the protection of property rights against wrongful takings.

The *National Federation of Independent Business* (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents about 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

The *National Federation of Independent Business Small Business Legal Center* (NFIB Legal Center) is a nonprofit, public interest law firm established to

provide legal resources and be the voice for small businesses in the nation's courts on issues of public interest affecting small businesses. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs in cases that will impact small businesses.

The *National Association of Home Builders* (NAHB) is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 800 state and local associations. About one-third of NAHB's approximately 140,000 members are home builders or remodelers, and they constitute 80% of all home construction in the United States. NAHB is a vigilant advocate in the nation's courts. It frequently participates as a party litigant and *amicus curiae* to safeguard the constitutional and statutory rights and business interests of its members and those similarly situated.

The *Reason Foundation* is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to advance a free society by developing, applying, and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason supports dynamic market-based public policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing *Reason* magazine, as well as commentary on its websites, *www.reason.com* and *www.reason.tv*, and by issuing policy research reports. To further Reason's commitment to "Free Minds and Free Markets," Rea-

son selectively participates as *amicus curiae* in cases raising significant constitutional issues.

Southeastern Legal Foundation (SLF), founded in 1976, is a national non-profit, public interest law firm and policy center that promotes the public interest in the proper construction and enforcement of the laws and Constitution of the United States in the courts of law and through public discourse. SLF advocates constitutional individual liberties, private property rights, limited government, and the free enterprise system in its litigation cases and *amicus* participation in state and federal courts.

Supreme Court, U.S.
FILED
MAR 9 - 2015
OFFICE OF THE CLERK

No. 14-275

In the

Supreme Court of the United States

MARVIN D. HORNE, *et al.*,

Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CENTER FOR CONSTITUTIONAL JURISPRUDENCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE CENTER FOR CONSTITUTIONAL JURISPRUDENCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute. The Institute is a non-profit organization with the mission to restore the principles of the American Founding to their rightful and preeminent authority in our national life. To safeguard these principles, the Center has represented parties in litigation in state and federal courts. The Center also participates as *amicus curiae* in significant cases before this Court—including in this case when it previously was before this Court. See *Horne* v. *Department of Agriculture*, 133 S. Ct. 2053 (2013); see also, *e.g.*, *Koontz* v. *St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013); *Arkansas Game & Fish Comm'n* v. *United States*, 133 S. Ct. 511 (2012); *Sackett* v. *Envt'l Protection Agency*, 132 S. Ct. 1367 (2012); *Stop the Beach Renourishment, Inc.* v. *Florida Dep't of Envt'l Protection*, 560 U.S. 702 (2010); *Kelo* v. *City of New London, Conn.*, 545 U.S. 469 (2005).[1]

Among the principles of the American Founding that the Center champions is the fundamental right, expressed in the Fifth Amendment to the United States Constitution, to be free of governmental tak-

[1] In accordance with Rule 37.6, the Center affirms that no counsel for a party authored this *amicus* brief in whole or in part and that no person other than the Center, its members, or its counsel have made any monetary contributions intended to fund the preparation or submission of this brief. Letters reflecting the parties' blanket consent to the filing of *amicus* briefs have been filed with the Clerk's office.

ings of private property unless the property is taken solely for public use and just compensation is paid. Indeed, this safeguard against governmental abuse predates the United States Constitution; it is one of the oldest and most firmly established principles in the Anglo-American legal tradition. Yet the decision of the court below effectively eviscerated constitutional protection against uncompensated takings for all property other than land. Because that ruling represents a radical departure from our founding principles, the Center has a strong interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The relevant facts of this case are straightforward. Each year, the United States Department of Agriculture requires petitioners to surrender a portion of their raisin crop to the Raisin Administrative Committee (RAC), an entity that is directly overseen by the Department of Agriculture. 7 C.F.R. § 989.66(a). In the years at issue in this case, the Department required farmers to cede as much as 47 percent of their raisin crop. See RAC, *Marketing Policy and Industry Statistics* 27 (2010), *available at* http://www.raisins.org/files/Marketing%20Policy%202010.pdf.

The government's purported goal in seizing privately grown raisins is to "stabilize market conditions." Pet. App. 21a. To that end, the Raisin Administrative Committee "dispose[s]" of seized raisins in various ways at its discretion—including sometimes by destroying them or gifting them to federal agencies or foreign governments. 7 C.F.R. § 989.67.

Raisin "handlers" whose raisins are taken receive no direct and immediate compensation. 7 C.F.R. § 989.66(f).[2] Instead, the federal government provides them with a share of the uncertain—and perhaps nonexistent—future proceeds of the disposal of the seized raisins. 7 C.F.R. § 989.66(h). If the Raisin Administrative Committee chooses to dispose of the raisins in a way that generates revenue, that money is used first to pay the Committee's expenses and the costs of the regulatory program. Only if any money remains is it distributed pro rata to the farmers. *Ibid.* In the period covered by this case, raisin farmers received either compensation that was less than the cost of production or—as happened during half of the relevant period—no compensation at all. See RAC, *Analysis Report* 23 (Aug. 1, 2006), *available at* http://www.raisins.org/analysis_report/analysis_report.pdf.

Raisin handlers who refuse to comply with this program—including the petitioners here—face steep fines. Pet. App. 8a. When petitioners refused to surrender their raisins, they were fined an amount that exceeded the fair market value of the raisins that they had withheld. Pet. App. 8a n.6.

The Fifth Amendment to the United States Constitution does not permit this result, but the Ninth Circuit nonetheless held that this regulatory program does not even involve a taking. Pet. App. 22a n.16. The panel reasoned that the Fifth Amendment's "categorical rule" that the government must

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[2] "Handlers" process raisins, 7 C.F.R. § 989.15, while "producers" grow the grapes from which raisins are made. 7 C.F.R. § 989.11. Though producers often sell their grapes to handlers, petitioners in this case process their own crop, so they are both producers and handlers. Pet. App. 257a.

provide just compensation when it seizes private property applies only to real property, not to personal property such as crops. Pet. App. 17a-20a.

Petitioners have convincingly demonstrated that the Ninth Circuit's decision is contrary to this Court's precedent. Pet. Br. 33-36. The Center submits this brief to confirm that the Ninth Circuit's decision is also contrary to almost a millennia of legal tradition, from before the signing of Magna Carta, through the ratification of the Bill of Rights.

The Framers of the Bill of Rights wrote the Fifth Amendment of the United States Constitution to protect *all* types of property, both personal and real. Indeed, in declaring that private property shall not "be taken for public use, without just compensation" U.S. Const. amend. V., the Framers were codifying an ancient right that had been accepted as a part of their legal tradition since before Magna Carta. Throughout that long history, personal property was protected at least to the same extent as real property, and sometimes received even greater protection. The Ninth Circuit, however, rejected over 800 years of history in declaring that "the Takings Clause affords more protection to real than to personal property" and holding that the seizure of the personal property at issue in this case—raisin crops—does not even constitute a "taking" at all. Pet. App. 19a, 22a n.16.

The Ninth Circuit blessed the government's actions in this case because the court believed that there was a "sufficient nexus" between the government's objective ("stabilizing the domestic raisin market") and the means it chose to achieve it (seizing raisins). Pet. App. 29a. The Ninth Circuit is mistaken. When the government seizes private property, the government's objective is constitutionally irrele-

vant. Throughout history, the right to just compensation has applied with full force even when the government was seizing private property for reasons of the highest order—such as use in wars of self-preservation. The right to just compensation therefore applies with equal force in this case.

ARGUMENT

As this Court has recognized, the Bill of Rights was not written to recognize "new" rights, but rather to memorialize rights that had long been recognized under both common law and natural law. *Dist. of Columbia* v. *Heller*, 554 U.S. 570, 599 (2008); *Pac. Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 34 (1991); *Dennis* v. *United States*, 341 U.S. 494, 524 (1951). In purporting to draw a distinction between the constitutional protections afforded to real property and personal property, the Ninth Circuit has departed from both the original understanding of the Fifth Amendment and from over 800 years of legal precedent.

A. Magna Carta Explicitly Required Prompt Compensation For Takings Of Personal Property.

The long tradition of protecting personal property from government seizures goes back at least as far as the signing of Magna Carta in 1215. That charter "is in many ways the spiritual and legal ancestor of what we today call the 'rule of law.'" Parker of Waddington, Lord Chief Justice of England, *Foreword* to A.E. Dick Howard, *The Road from Runnymede: Magna Carta and Constitutionalism in America*, at x (1968). Although the great charter is often studied today as "an ancestor on the family tree of American constitutionalism," *id.* at 13, it also speaks in literal

and specific terms about the precise issues raised by this case.

Among the grievances of the barons who compelled King John to sign Magna Carta was the King's abuse of the royal prerogative of "purveyance." Purveyance was, as Blackstone explained, the right of the king to "bu[y] up provisions and other necessaries * * * at an appraised valuation, in preference to all others, and even without consent of the owner." 1 William Blackstone, *Commentaries* *277. In other words, purveyance was a species of what we now call eminent domain. See *Little Rock Junction Ry.* v. *Woodruff*, 49 Ark. 381, 381 (1887) ("[Eminent domain] bears a striking analogy to the king's ancient prerogative of purveyance, which was recognized and regulated by the twenty-eighth section of *magna charta*"). This prerogative was important to English kings because the royal court in John's time was "very frequently" "removed from one part of the kingdom to another." 1 Blackstone *277. The king's right to purchase provisions at market rates ensured "that the work of government should not be brought to a stand-still for want of supplies." William Sharp McKechnie, *Magna Carta: A Commentary on the Great Charter of King John, with an Historical Introduction* 330 (1914).

King John used purveyance not only for its traditional purpose—to support his personal retinue—but also to provision some seventy castles around England that he deemed essential to maintaining his rule. *The 1215 Magna Carta: Clause 28, Academic commentary, The Magna Carta Project*, http://magnacarta.cmp.uea.ac.uk/read/magna_carta_1215/Clause_28. Castle garrisons were expensive, and they required ample stockpiles of provisions in

case of a protracted siege. *Id.* Although the use of purveyance to support garrisons was not King John's innovation, his heavy strategic dependence on castles made the practice particularly important to him, and particularly onerous to his subjects. *Ibid.*

At the time of Magna Carta, there was no dispute that the king and his deputies were obligated to pay for the provisions they took. But controversy arose because "[p]ayment was often indefinitely delayed or made not in coin but in exchequer tallies." McKechnie at 330.[3] Sometimes payment was deferred in this fashion by corrupt purveyors who sought to enrich themselves by avoiding ever making payment. *Id.* at 331; 1 Blackstone *277-78. But it is also likely that even scrupulous purveyors had difficulty making prompt payment because of the scarcity of coin at the time. 1 Blackstone *277-78.

Magna Carta contained several clauses addressing King John's abuse of purveyance. Clause 28 states (in translation) that:

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[3] Exchequer tallies were sticks used to memorialize royal debts owed to particular subjects. Marks would be made along the length of the stick to record the size of the debt, and then the stick would be split lengthwise. Each half of the stick would contain a portion of all of the lines, and because of irregularities in the wood, the sticks were difficult to forge. Each party would keep half of the stick; those halves later could be matched up to prove their authenticity. But exchequer tallies were less transferrable than coins because of the difficulty in proving to potential transferees that one half of a stick actually conformed to another half held by the Exchequer. So, in practice, Exchequer tallies' primary use was to offset the creditor's future taxes. *See* Christine Desan, *Making Money: Coin, Currency, and the Coming of Capitalism* 175-185 (2014).

> No constable or other bailiff of ours shall take corn or other provisions from any one without immediately tendering money therefor, unless he can have postponement thereof by permission of the seller.[4]

Clause 30 states that:

> No sheriff, or bailiff of ours, or anyone else is to take any free man's horses or carts for transporting things, except with the free man's consent.[5]

And Clause 31 states that:

> Neither we nor our bailiffs are to take another man's wood to a castle, or on other business of ours, except with the consent of the person whose wood it is.[6]

By requiring contemporaneous payment in coin for seizures of provisions, and by prohibiting outright seizures of horses, carts, and timber, these clauses demonstrate that protection of personal property—not just real property—and requiring prompt pay-

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[4] The original Latin reads: "Nullus constabularius, vel alius ballivus noster, capiat blada vel alia catalla alicujus, nisi statim inde reddat denarios, aut respectum inde habere possit de voluntate venditoris." Magna Carta Cl. 28, http://magnacarta.cmp.uea.ac.uk/read/magna_carta_1215/!all.

[5] The original Latin reads: "Nullus vicecomes, vel ballivus noster, vel aliquis alius capiat equos vel caretas alicujus liberi hominis pro cariagio faciendo, nisi de voluntate ipsius liberi hominis." Magna Carta Cl. 30, http://magnacarta.cmp.uea.ac.uk/read/magna_carta_1215/!all.

[6] The original Latin reads: "Nec nos nec ballivi nostri capiemus alienum boscum ad castra, vel alia agenda nostra, nisi per voluntatem ipsius cujus boscus ille fuerit." Magna Carta Cl. 31, http://magnacarta.cmp.uea.ac.uk/read/magna_carta_1215/!all.

ment of just compensation were central concerns of Magna Carta.

The requirement of contemporaneous payment for seized provisions was a crucial protection for the barons because promises of future payment could prove illusory. In that regard, the barons' concern mirrored those of the petitioners in this case. Petitioners did not want to surrender their raisin crops—their personal property—for a contingent future interest that might prove entirely illusory. See Pet. App. 3a ("In some years this 'equitable distribution' * * * is zero").

Indeed, because Magna Carta required immediate payment of just compensation when the government seized privately owned crops, the outcome of this case would have been an easy call in the thirteenth century. Yet the United States government now claims that it can do to raisin farmers what King John forswore ever doing to his own people.

B. The American Colonists Inherited Magna Carta's Tradition Of Just Compensation For Takings Of Personal Property.

Magna Carta was a foundational document of the English legal tradition in which the Framers of the United States Constitution were steeped.

In the centuries after the enactment of Magna Carta, its rights and restrictions on governmental power—including its requirement of just compensation for takings of personal property—were consistently reaffirmed by English monarchs and Parliaments. The charter was reissued four times—by Henry III in 1216, 1217 and 1225, and by Edward I in 1297. A.E. Dick Howard, *Magna Carta: Text and Commentary* 24 (1964). And Magna Carta was con-

firmed by parliaments at least fifty more times by 1422. J.C. Holt, *The Ancient Constitution in Medieval England, in The Roots of Liberty: Magna Carta, Ancient Constitution, and the Anglo-American Tradition of Rule of Law* 55 (Ellis Sandoz ed.,1993).

Magna Carta—and its prohibition against uncompensated takings—eventually evolved into a form of constitutional law. In 1369 Parliament expressly elevated Magna Carta to the status of "higher law" by declaring that the charter "be holden and kept in all Points; and if there be any Statute made to the contrary, it shall be holden for none.". McKechnie 185, *quoting Confirmation of Charters Act 1368*, 42 Edw. 3 c. 1. Lord Coke in an address to Parliament echoed the principle: "Magna Charta is such a fellow, that he will have no 'Sovereign'." 2 William Cobbett, *Parliamentary History of England, from the Earliest Period to the Year 1803* 357 (1807); *see also Dr. Bonham's Case*, 8 Co. Rep. 107a, 114a (C.P. 1610) ("for when an act of parliament is against common right and reason * * * the common law will * * * adjudge such act to be void"), *reprinted in* 5 *The Founders' Constitution* 303 (Philip B. Kurland and Ralph Lerner, eds., 1987).

William Blackstone confirmed that the right to just compensation was a well established aspect of the common law by the middle of the eighteenth century:

> But how does [the legislature] interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an ex-

> change. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price.

1 Blackstone *135. Blackstone's writings regularly use the term "possession" in reference to personal property.[7] His works were quite familiar to the founders. See Edmund Burke, *Speech on Conciliation with the Colonies* (Mar. 22, 1775), *reprinted in* 1 *The Founders' Constitution* 464 ("I hear that they have sold nearly as many of Blackstone's Commentaries in America as in England").

Unsurprisingly, when framing their own colonial governments, American colonists repeatedly referenced the natural rights enshrined by Magna Carta. The great charter's principle of just compensation for takings of personal property appears in colonial documents as early as 1641, when the Massachussetts General Court established a "Body of Liberties," which, in many of its provisions bears "striking" resemblance to Magna Carta. Howard, *Road from Runnymede*, at 37. In particular, the Body of Liberties stated that:

> No mans Cattel or goods of what kinde soever shall be pressed or taken for any publique use or service, unless it be by warrant

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[7] See, e.g., 2 Blackstone *389 ("[P]roperty * * * in possession * * *of any moveable chattels * * *may * * * [include] all inanimate things, as goods, plate, money, jewels, implements of war, garments, and the like; such also may be *all vegetable productions, as the fruit or other parts*, when severed from the plant, or the whole plant itself, when severed from the ground; none of which can be moved out of the owner's possession without his own act or consent, or at least without doing him an injury, which it is the business of the law to prevent or remedy") (emphasis added).

> grounded upon some act of the generall Court, nor without such reasonable prices and hire as the ordinarie rates of the Countrie do afford. And if his Cattle or goods shall perish or suffer damage in such service, the owner shall be suffitiently recompenced.

Massachusetts Body of Liberties (Dec. 10, 1641), *reprinted in Sources of Our Liberties* 149 (Richard L. Perry and John C. Cooper, eds., 1978).

The 1663 Charter of the Carolinas went even further, stating that the Carolina Assembly's ordinances could not extend "to the binding, charging, or taking away of the right or interest of any person or persons, in their freehold, goods or chattels whatsoever." Charter of Carolina (Mar. 24, 1663), *available at* http://avalon.law.yale.edu/17th_century/nc01.asp. The early colonists thus considered the protections against takings of personal property to be at least on equal footing with the protections afforded to real property.

The right to just compensation also appears in important founding-era declarations of rights. The language of these declarations and their historical context indicate that they protected personal property, and in particular, provisions and equipment seized by the military during wartime. For example, the Northwest Ordinance of 1787 stated:

> [S]hould the *public exigencies make it necessary, for the common preservation*, to take any person's property, or to demand his par-

> ticular services, full compensation shall be made for the same.[8]

The Massachusetts constitution of 1780 stated:

> [W]henever the *public exigencies* require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefore.[9]

And the Vermont constitution of 1777 stated:

> That private property ought to be subservient to public uses, when necessity requires it; nevertheless, whenever any particular man's property is taken for the use of the public, the owner ought to receive an equivalent in money.[10]

These references to "the common preservation," "public exigencies," and "necessity," indicate that military impressments were a key issue during those turbulent years. Indeed, in a 1778 letter to the New York Legislature, John Jay complained of "the Practice of impressing Horses, Teems, and Carriages by the military, without the Intervention of a civil Magistrate, and without any Authority from the Law of the Land." John Jay, *A Freeholder, A Hint to the Legislature of the State of New York* (1778), *reprinted in* 5 *The Founders' Constitution* 312. Such materiel

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[8] *Northwest Ordinance: An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio* (July 13, 1787), *reprinted in Sources of Our Liberties* 395 (emphasis added).

[9] Constitution of Massachusetts (Oct. 25, 1780), *reprinted in Sources of Our Liberties* 375-76 (emphasis added).

[10] Constitution of Vermont (July 8, 1777), *reprinted in Sources of Our Liberties* 365 (emphasis added).

seized by the military during a time of war was, of course, personal property.

To be sure, some colonial declarations of rights did not expressly detail just compensation protections against governmental takings. See, *e.g.*, Constitution of Virginia (June 12, 1776) § 6 ("[A]ll men * * * cannot be taxed or deprived of their property for public uses, without their own consent, or that of their representatives so elected."), *reprinted in Sources of Our Liberties* 312. But that omission appears to be because the principle was so well understood that its enumeration was not considered necessary. See, *e.g.*, *An Act for enabling the publick contractors to procure stores of provisions necessary for the ensuing campaign, and to prohibit the exportation of beef, pork, and bacon, for a limited time* (Oct. 1777) in William Waller Hening, 9 *The Statutes at Large: Being a Collection of All the Laws of Virginia* 386 (1821) (empowering officials to take beef, pork, or bacon upon "paying or tendering to the owner the price so estimated by the appraisers."). Colonial legislatures, almost without exception, provided compensation when they appropriated property for public use. James W. Ely, *"That due satisfaction may be made:" the Fifth Amendment and the Origins of the Compensation Principle*, 36 Am. J. Legal Hist. 1, 11-13 (1992).[11] And this practice of providing compensation

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[11] The one notable exception to the widespread practice of providing just compensation was that a few colonies did not provide compensation when they took unimproved land to build public roads. But, as Professor Ely has explained, there are several reasons why in the colonial context this was not a breach of the compensation principle. See Ely at 11. When land was plentiful, colonists would probably have believed that unimproved land was of little value, and rudimentary dirt roads would have constituted only a *de minimus* intrusion. *Ibid.* A road might

included takings of personal property, such as timber. *Ibid.* The fact that these early American governments so uniformly provided compensation confirmed their shared understanding that foundational principles of justice and due process required it.

The colonial legislatures recognized the right to just compensation for takings of both personal and real property implicitly; state courts issued decisions that recognized the right expressly. For example, in 1670, a Maryland court held that an uncompensated seizure of cattle was "Contrary to the Act of Parliamt [sic] of Magna Charta." *Hooper* v. *Burgess* (Provincial Ct. of Md. 1670), *reprinted in* 57 *Archives of Maryland, Proceeding of the Provincial Court 1666-1670*, at 571, 574 (J. Hall Pleasants ed., 1940). The court awarded the plaintiff compensation of "Forty Five Thousand Nyne Hundred & Fifty poundes of Tobaccoe." *Id.*[12]

Early state decisions addressing takings of real property also emphasized the importance of Magna Carta for providing the contours of the protections under natural law against governmental takings. For

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have increased the value of the adjoining land by making it accessible, perhaps facilitating improvements that had theretofore not been feasible. Moreover, "[a]s the colonies matured, and undeveloped land became more valuable, lawmakers increasingly acknowledged the right of landowners to receive compensation when the government took property for roads." *Ibid.* Finally, under Lockean natural law theories of property that would have been familiar to the colonists, wild land cannot truly be owned until someone has "mixed his labour with" it. John Locke, *Second Treatise on Government*, Chapter 5, Section 27 (1690).

[12] Tobacco was commonly used as currency in Maryland at the time. J. Thomas Scharf, 1 *History of Maryland from the Earliest Period to the Present Day* 132 (1879).

example, Chancellor James Kent, writing for the New York Court of Appeals, grounded the right to just compensation in Magna Carta. In *Gardner* v. *Village of Newburgh*, 2 Johns Ch. 162 (N.Y. Chancery Ct. 1816), the Chancellor examined a statute that authorized a village to construct a public water system. *Id.* at 162. The statute provided compensation for the owner of the stream from which the water would be taken, as well as to the owners of the land over which pipes would have to be built. *Id.* at 163-164. There was no provision in the statute, however, to compensate the owners of land adjacent to the stream for their loss in riparian rights. *Ibid.* This omission, Chancellor Kent held, rendered the statute void as contrary to "natural equity." *Id.* at 166.; *see also, e.g.*, *Bradshaw* v. *Rogers*, 20 Johns. R. 103 (N.Y. 1822) (Fifth Amendment's prohibition of uncompensated takings is simply "declaratory of a great and fundamental principle of government" arising from "natural rights and justice").

The Georgia Supreme Court expressed similar sentiments. In discussing the Fifth Amendment's just compensation requirement, the court said:

> Did not the same principle of restriction exist, both as it regards the Federal and State government, before the adoption of the amendment in question? Does the amended constitution do anything more than declare a great common law principle, applicable to all governments, both State and Federal, which has existed from the time of *Magna Charta*, to the present moment?

Young v. *McKenzie*, 3 Ga. 31, 41-42 (1847). Further examples abound.[13]

In sum, the shared understanding of scholars, colonial and early state legislatures and courts, and the framers of the United States Constitution was that the principles of natural law expounded in Magna Carta were woven into the fabric of American law. And one of the most firmly established of those principles was the prohibition against uncompensated takings of both real and personal property.

C. The Fifth Amendment Restated Magna Carta's Principle Of Just Compensation For Takings Of Personal Property.

The history of the enactment of the Fifth Amendment to the United States Constitution confirms that it was a ratification of the natural law right to just compensation for takings of all types of property—real and personal—that was articulated in

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[13] *E.g.*, *Parham* v. *Justices*, 9 Ga. 341, 349-50 (1851) (just compensation "was the law of the land in England, before *Magna Charta*. It came to us with the Common Law—it is part and parcel of our social polity—it is inherent in ours, as well as every other free government * * * as being founded in natural equity and of universal application"); *In re Public Highway*, 22 N.J. L. 293, 302 (1849) (just compensation "is a dictate of natural justice. It is founded in natural law. It has its origin back of political constitutions"); *Proprietors of the Piscataqua Bridge* v. *N.H. Bridge*, 7 N.H. 35, 66 (1834) (right to just compensation stems not only from state constitution but also is "a matter of * * * justice"); *Bristol* v. *New-Chester*, 3 N.H. 524, 535 (1826) ("[C]ompensation shall be made. And natural justice speaks on this point, where our constitution is silent."); *Bowman* v. *Middleton*, 1 Bay 252 (S.C. Ct. Common Pleas 1792) (declaring that it would be "against common right, as well as against magna charta, to take away the freehold of one man, and vest it in another without any compensation").

Magna Carta. Indeed, the Takings Clause was originally understood as embodying a preexisting legal tradition. As this Court has explained, "[t]he law is perfectly well settled that the first 10 amendments to the Constitution, commonly known as the 'Bill of Rights,' were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors." *Robertson* v. *Baldwin*, 165 U.S. 275, 281 (1897). And addressing the Takings Clause in particular, Joseph Story explained that the clause was "an affirmance of a great doctrine established by the common law for the protection of private property." 3 *Commentaries on the Constitution of the United States* 661 (1833).

The addition of the Takings Clause to the United States Constitution was perhaps the least controversial of the proposed amendments in the Bill of Rights. James Madison, the initial drafter of the Bill of Rights, explained in a letter to Thomas Jefferson that in drafting the Bill, "[e]very thing of a controvertible nature that might endanger the concurrence of two-thirds of each House and three-fourths of the States was studiously avoided." Letter from James Madison to Thomas Jefferson (June 30, 1789) *in* 12 *The Papers of James Madison* 272 (Robert A. Rutland and Charles F. Hobson, eds., 1979). And the Takings Clause itself was the subject of virtually no controversy at all. It is the only right in the entire Bill of Rights that was neither proposed by a state nor debated at the Constitutional Convention.[14] To

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[14] See Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CAL. L. REV. 267, 282 (1988).

the contrary, Madison included the Takings Clause entirely of his own volition. And once Madison introduced it, the Takings Clause was accepted with only stylistic changes, generating no surviving commentary whatsoever. See James Madison, *Amendments to the Constitution* (June 8, 1789), *in The Papers of James Madison* 201 ("No person shall be * * * obliged to relinquish his property, where it may be necessary for public use, without a just compensation.").

Although Madison never explained why he included the Takings Clause in the Bill of Rights, his writings do reveal his belief that the Clause was a restatement of natural law principles that protect personal property as well as real property. In his essay, "Property," he discusses multiple conceptions of property. He explained that the Takings Clause protects only a narrow conception of property. James Madison, *Property* (Mar. 29, 1792), *reprinted in* 1 *Founders' Constitution* 598. But even that narrow exception included not only "land," but also personal property, such as "merchandise, and money." *Ibid.* Madison thus drew no constitutional distinction between the sanctity of land and that of personal property.

The nearest contemporary commentary on the Takings Clause confirms Madison's understanding. Professor St. George Tucker wrote in 1803 that the Clause "was probably intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressments, as was too frequently practiced during the revolutionary war, without any compensation whatever." St. George Tucker, 1 *Blackstone's Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of*

the Commonwealth of Virginia 305-06 (1803). Tucker's interpretation is bolstered by John Jay's letter to the New York Legislature in 1778, which indicated that military impressments of crops and other personal property had been a recent problem that the ratification of the Takings Clause could rectify. See *supra* p. 13.

John Jay's concern that the army was seizing goods without paying for them is the same concern that spurred King John's barons to insist upon the signing of Magna Carta in 1215. This parallel is unsurprising, despite the intervening centuries. For while governments have long found uses for privately owned land, governments have an even more pressing need to consume resources, especially during military campaigns. There may be no more fundamental conflict than that between the government's needs and the individual's property. But the proper balance was struck long ago: Governments are entrusted with the power of taking personal and real property from unwilling owners, but must always compensate them justly and promptly, ensuring that the burdens are borne equitably by society as a whole.

For constitutional purposes, there is no distinction between the Raisin Administrative Committee's seizure of raisins and thirteenth century castellans' seizure of grain: Both governmental entities must promptly pay compensation when they seize personal property. The fact that the federal government in this case purports to be seizing crops for the good of farmers does not take this case beyond the reach of the Fifth Amendment. The farmers who were forced to stock the storehouses of English castles also benefitted from the protection those castles provided.

In sum, in the 800 years since Magna Carta, the Anglo-American legal tradition—passed down in undiluted form to the Framers of the Bill of Rights—has consistently required payment of just compensation for governmental takings of personal property, such as crops. The decision below flouts that history and shared understanding of the meaning of the Takings Clause. The approach of the court below strips personal property of constitutional protections against takings, and cannot be sustained.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted.

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MARCH 2015

Supreme Court, U.S.
FILED
MAR 9 - 2015
OFFICE OF THE CLERK

No. 14-275

In the Supreme Court of the United States

MARVIN D. HORNE, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1912, the Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees. The Chamber represents the interests of its members in matters before Congress, the Executive Branch, and the courts.

The Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the Nation's business community, including cases defending constitutional protections for private property rights against government infringement. The Chamber filed a brief *amicus curiae* at the certiorari stage in this case, a brief *amicus curiae* supporting the same property owners when this case was last before this Court as *Horne* v. *Department of Agriculture*, No. 12-123 (leading to a unanimous reversal of the Ninth Circuit's prior judgment), and in *Koontz* v. *St. Johns River Water Management District*, No. 11-1447 (which resulted in a property-rights-protective ruling that supports petitioners in this case).

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[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, and its counsel made any monetary contribution to its preparation and submission. The parties have consented to this filing.

On remand from this Court's prior reversal, the Ninth Circuit again sharply departed from this Court's longstanding takings jurisprudence, adopting a dangerous new test that guts property rights protections. The decision is of grave practical concern to the Chamber and its members, which have a substantial interest in ensuring that property owners retain an adequate, efficient, and prompt remedy against government takings of real and personal property. Historically, the property rights of Chamber members have been subject to infringement by state and federal governments in a wide range of circumstances, including through laws, like those at issue here, which impose monetary fines or penalties as a proxy for outright physical appropriation of private property.

The Ninth Circuit held here that a federal law requiring petitioners to transfer physically to the government a substantial portion of their annual raisin crop—or face a fine, including an amount equal to the value of the raisins that the government demanded be handed over—was not a categorical "taking." Thus, property owners are protected under the Fifth Amendment, if at all, only by the "nexus and rough proportionality" standard formerly limited to land-use exactions, or the general ad hoc regulatory takings doctrine. Adding insult to injury, the court below sought to defend its rule by suggesting that petitioners could avoid the expropriation simply by abandoning their four-generation family vocation and instead "choosing" to produce something other than raisins. The Ninth Circuit's radical decision (and the government's shifting array of novel and flawed theories proffered to defend it) creates

significant doctrinal confusion and substantially weakens Fifth and Fourteenth Amendment rights, with wide-ranging consequences for business interests and private property holders nationwide. The Court should reverse.

SUMMARY OF ARGUMENT

The decision below improperly conflates the categorical framework long applicable to permanent physical occupations of property with the more fact-intensive analysis used for regulatory takings—including a balancing test that this Court has traditionally reserved for land-use exactions. In particular, the Ninth Circuit's holding that *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), "applies *only* to a total, permanent physical invasion of *real* property" (Pet. App. 17a (emphases added))—and thus is inapplicable when the government appropriates personal property—represents a dangerous retreat from a bright-line rule that has long served as an important bulwark for property rights, as reflected in this Court's and lower-court authority.

The decision threatens private property rights in a broad range of contexts, and creates dangerous incentives for the government to disguise traditional takings in an effort to reframe the governing legal analysis and exploit the loophole created by the panel's novel doctrinal approach. Personal property is no less at risk of government interference—and thus no less deserving of the certainty and predictability provided by a per se rule for physical takings—than real property. Case reporters are replete with examples of the government appropriating personal

property, illustrating the diverse forms of interference with, and abuse of, property rights that the decision effectively green-lights.

The decision below also errs by holding just compensation is not required where a property owner retains some theoretical right to proceeds from the property or benefit from a regulatory scheme, and that a permanent physical occupation can be reframed as a mere "use restriction." The outright physical appropriation that occurs under this regulatory regime cannot be immunized from constitutional scrutiny simply by analogizing it to a different (and hypothetical) law that regulates how and when a private owner may dispose of its own raisins in commerce.

The panel's "use restriction" theory, in particular, amounts to the unprecedented and indefensible notion that the government can condition a property owner's ability to sell goods on its "agreement" to hand over a significant fraction of its property to the government, for the government to dispose of as it sees fit. That dangerous idea is anathema to bedrock principles of property rights, admits to no principled limitation, and is irreconcilable with numerous decisions of this Court and lower state and federal courts.

This Court should reverse the judgment below, and reaffirm *Loretto*'s core teaching that a taking occurs whenever the government physically occupies or appropriates private property. That result is necessary to avert dire effects on private property rights nationwide and to avoid inviting governments to reframe a broad range of unconstitutional appropriations as mere "use restrictions."

ARGUMENT

I. Diluting The Per Se Physical Takings Doctrine Will Have Serious Negative Effects On Property Rights Nationwide

As petitioners explain, the panel erred, and ignored the weight of well-reasoned decisions from other courts, by holding that: (1) the government's appropriation of a portion of petitioners' raisin crop does not constitute a per se physical taking of private property under *Loretto*; (2) there was no per se taking because petitioners purportedly retained a contingent, theoretical interest in the raisins or enjoyed indirect benefits from the regulatory program as a whole; and (3) whether the regulation effects a categorical taking is governed by the "nexus and rough proportionality" balancing test for land-use exactions under *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994). *Amicus* complements that analysis by illustrating how the panel's holding will have wide-ranging negative practical effects on private property rights, and by highlighting the ways in which the decision creates doctrinal confusion and harms important interests that are far better served by the long-standing categorical rule.[2]

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[2] Contrary to its prior representations to this Court and others, the government's brief in opposition for the first time argues that the raisin marketing order does not formally transfer "title" from raisin producers to the Raisin Administrative Committee. See Br. in Opp. 6, 17, 23. As petitioners explain, the argument is unavailing, because physical appropriation of property implicates the Takings Clause. *E.g.*, *United States* v. *General Motors Corp.*, 323 U.S. 373, 378 (1945) ("Governmental action short of acquisition of

A. The Per Se Physical Takings Rule Is An Important Bulwark For Private Property Rights

The panel's basic doctrinal innovation—*i.e.*, analyzing a physical appropriation of petitioners' raisins under the ad hoc, fact-intensive regulatory takings standard rather than *Loretto*'s per se rule—undermines important interests of predictability and clarity reflected in this Court's development of categorical rules for particular classes of takings.

1. Regulatory takings have long been governed by the "essentially *ad hoc*, factual inquir[y]" set forth in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978); see also *E. Enters.* v. *Apfel*, 524 U.S. 498, 523 (1998) (plurality opinion). By design and practical effect, that approach requires

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title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking."); Pet. Br. 23-25.

Here, the marketing order requires producers to give up physical possession of "reserve" raisins, requires handlers to store reserve raisins "for the account" of the Raisin Administrative Committee, requires raisins to be delivered to the committee at its sole direction, 7 C.F.R. §§ 989.66(a), (b)(2), (b)(4), and vests the Committee with typical rights and obligations of ownership, see *id.* §§ 989.66(f), (g), 989.67(b)-(e) (Committee pays costs of storage, may "in its discretion" use raisins as "security" for loans, and can sell or "gift" raisins as it sees fit); accord Pet. Br. 23-25. Retention of a vague "equitable" claim to such proceeds (if any) remaining after the government has disposed of reserve raisins in this fashion, 7 U.S.C. § 608c(6)(E), is a far cry from rights long protected by the Takings Clause. See *Loretto*, 458 U.S. at 435 ("Property rights in a physical thing have been described as the rights to possess, use and dispose of it." (quotation marks omitted)).

courts to undertake "complex factual assessments of the purposes and economic effects of government actions," *Yee* v. *City of Escondido*, 503 U.S. 519, 523 (1992), and to grapple with that "well-known, if less than self-defining" question, *Palazzolo* v. *Rhode Island*, 533 U.S. 606, 617 (2001), of whether a particular regulation "goes too far," *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922). That approach stems from the pragmatic concern that subjecting "regulations prohibiting private uses [of property]" to a categorical takings rule "would transform government regulation into a luxury few governments could afford," given the "ubiquit[y]" of such regulations in the modern era. *Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302, 323-324 (2002). But the regulatory takings test has, in practice, become a famously "difficult problem"; "The attempt to determine when regulation goes so far that it becomes, literally or figuratively, a 'taking' has been called the 'lawyer's equivalent of the physicist's hunt for the quark.'" *Williamson Cnty. Reg'l Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U.S. 172, 199-200 & n.17 (1985) (quoting C. Haar, *Land-Use Planning* 766 (3d ed. 1976)).

This complex and fact-intensive approach for regulatory takings analysis imposes significant costs on property owners and litigants, burdening the exercise of private property rights. "[A] party challenging governmental action as an unconstitutional taking bears a substantial burden," *E. Enters.*, 524 U.S. at 523, in navigating the complex, ad hoc, regulatory-takings framework. In addition to requiring property owners to adduce proof on a wide range of issues (such as a regulation's "economic effect on the land-

owner," interference with "reasonable investment-backed expectations," and "the character of the government action," *Palazzolo*, 533 U.S. at 617), the regulatory takings doctrine necessarily deprives property owners of predictability and certainty. "Cases attempting to decide when a regulation becomes a taking are among the most litigated and perplexing in current law." *E. Enters.*, 524 U.S. at 541 (Kennedy, J., concurring in the judgment and dissenting in part); see also *Store Safe Redlands Assocs.* v. *United States*, 35 Fed. Cl. 726, 729 (1996) ("Since 1922, the Supreme Court has applied a test in regulatory taking cases that is seen by many as so fact specific that general predictability is made very difficult."). Governments, too, suffer costs and uncertainty from unpredictable legal rules. See *E. Enters.*, 524 U.S. at 542 (Kennedy, J.) ("boundar[ies] for application of the regulatory takings rule provid[e] some necessary predictability for governmental entities").

Similar concerns have been raised about the balancing test from *Nollan* and *Dolan* applicable to land-use exactions, which the Ninth Circuit extended to personal property. Although the "essential nexus" and "rough proportionality" standards have been viewed by some as "apply[ing] heightened scrutiny to challenged land use regulations," Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 Cal. L. Rev. 609, 622 (2004), by their terms they "are hardly beacons of clarity," Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 Cardozo L. Rev. 93, 107 n.55, 191 (2002); see also Fenster, 92 Cal. L. Rev. at 629, 630 (*Nollan* and *Dolan* are "less clear than * * * rules defining per se regulatory takings as

those that result in * * * permanent physical occupation," and "neither metric is exceptionally clear"). *Nollan* and *Dolan* require courts to grapple with a range of fact-intensive issues, including the "causal relationship between the harm of the proposed new use for the property, the regulation upon which the government relies in requiring the challenged concessions, the cost of the concessions, and the likelihood that the concessions would mitigate the harms." Fenster, 92 Cal. L. Rev. at 629-630; see also Pet. App. 26a-28a (panel decision analyzing purpose and performance of raisin marketing order for means-ends analysis).

In part for these reasons, ad hoc regulatory takings doctrines have engendered sharp criticism. See, *e.g.*, Bruce A. Ackerman, *Private Property and the Constitution* 8 (1977) (describing regulatory takings doctrine as "a chaos of confused argument"); Richard A. Epstein, *The Seven Deadly Sins of Takings Law: The Dissents in* Lucas *v.* South Carolina Coastal Council, 26 Loy. L.A. L. Rev. 955, 966 (1993) (takings test is "so amorphous as to defy description"); J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 Ecology L.Q. 89, 102 (1995) (an "unworkable muddle" that "has generated a plethora of inconsistent and open-ended formulations that have failed to make sense"); John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. Cal. L. Rev. 1003, 1006-1007 (2003) ("[a] jurisprudential mess"); Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. Cal. L. Rev. 561, 562 (1984) ("[C]ourts continue to reach ad hoc determinations rather than principled resolutions."); Charles M. Haar & Michael Allan Wolf, *Euclid Lives:*

The Survival of Progressive Jurisprudence, 115 Harv. L. Rev. 2158, 2170 (2002) ("hopelessly confused"); Joseph L. Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 37 (1964) ("a welter of confusing and apparently incompatible results"); Stephen Durden, *Unprincipled Principles: The Takings Clause Exemplar*, 3 Ala. C.R. & C.L. L. Rev. 25, 27-28 (2013) (describing doctrine as "famously incoherent and a mess, a muddle (or muddled), confused, incomprehensible, standardless, and unprincipled" (internal quotation marks omitted); collecting authorities); John A. Humbach, *A Unifying Theory for the Just-Compensation Cases: Takings, Regulation and Public Use*, 34 Rutgers L. Rev. 243, 244 (1982) ("farrago of fumblings").

2. In contrast to these fact-intensive, ad hoc inquiries, this Court has carved out several bright-line, categorical rules in areas where clarity is particularly important and "in-depth factual inquiry" unnecessary. *Nixon* v. *United States*, 978 F.2d 1269, 1284 (D.C. Cir. 1992). Most obviously, "[w]hen the government physically takes possession of an interest in property for some public purpose," the existence of a taking is typically self-evident and the government is categorically required to pay just compensation. *Tahoe-Sierra*, 535 U.S. at 322 (citing *United States* v. *Pewee Coal Co.*, 341 U.S. 114, 115 (1951)). And this Court has enforced the categorical rules that a taking occurs whenever there is a permanent physical occupation, *Loretto*, 458 U.S. at 426, or a deprivation of all economically beneficial use of private property, *Lucas* v. *S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992); accord Jed Rubenfeld, *Usings*, 102 Yale L.J. 1077, 1101 (1993) ("*Loretto* stands on the idea that particular incidents of property ownership have a

special status that compels compensation for their abridgment.").[3]

Commentators have lauded these per se rules for providing predictability and certainty for property owners—"a ray of light in the otherwise shadowy area of 'takings' law." Steven N. Berger, *Access for CATV Meets the Takings Clause: The Per Se Takings Rule of* Loretto *v.* Teleprompter Manhattan CATV Corp., 25 Ariz. L. Rev. 689, 703 (1983). *Loretto*'s per se rule has the virtue of making "it * * * easy to tell when the rule has been violated—a boundary is traversed." Poirer, 24 Cardozo L. Rev. at 108. As a result, property owners face a less onerous burden in defending and litigating their rights, while governments gain predictability and certainty in the conduct of public affairs, and are subject to the full financial deterrent of the just-compensation guarantee. See *Loretto*, 458 U.S. at 437 ("[W]hether a permanent physical occupation has occurred presents relatively few problems of proof.").

The clarity of these categorical rules also promotes important interests related to private property rights—interests sharply undermined by the Ninth Circuit's approach in this case. A per se rule allows property owners to make investments based on concrete expectations about the risk of government interference. See Patrick Wiseman, *When the End Justifies the Means: Understanding Takings Jurispru-*

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[3] Courts have applied both the *Loretto* and *Lucas* rules to personal property. See, *e.g.*, pp. 18-24, *infra*; *Maritrans Inc.* v. *United States*, 342 F.3d 1344, 1352-1353 (Fed. Cir. 2003) (rejecting government's argument that *Lucas* was inapplicable to takings of "tangible property," such as tank barges).

dence in a Legal System with Integrity, 63 St. John's L. Rev. 433, 457-458 (1988) ("Insofar as property is conceptually a set of expectations, any rule which tends to settle expectations is, in that respect at least, a good rule."); Carol M. Rose, *Crystals and Mud in Property Law*, 40 Stan. L. Rev. 577, 577 (1988) ("hard-edged rules like these * * * are what property is all about"). Put differently, "[t]akings law should be predictable * * * so that private individuals confidently can commit resources to capital projects." Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 Colum. L. Rev. 1697, 1700 (1988). Conversely, "ad hoc balancing is impossible to reconcile with a belief in the importance of preserving 'investment-backed expectation[s].'" *Ibid.*

Doctrinal clarity does much to preserve and protect property owners' investment-backed expectations. See Rose-Ackerman, 88 Colum. L. Rev. at 1711. By creating certainty that a physical invasion of property will result in just compensation, the per se rule establishes appropriate ex ante incentives for property owners, who will be secure in the knowledge that *any* physical invasion or occupation of property by the government is a compensable taking, whatever its scope or extent. See *Loretto*, 458 U.S. at 438 n.16 ("[W]hether the installation is a taking does not depend on whether the volume of space it occupies is bigger than a breadbox."). And "property owners and investors who believe that a rule-bound regulatory regime better protects their expectations than does an ad hoc balancing test in theory will commit more resources to capital projects, therefore enabling the highest and best use of property." Fenster, 92 Cal. L. Rev. at 620.

"By offering clear declarations of the extent of property owners' constitutional rights and limiting the discretion of judges and administrative decision makers, clear rules ensure fair and value-neutral coherence, regularity, and predictability across disparate, individual cases." Fenster, 92 Cal. L. Rev. at 619. Conversely, doctrinal uncertainty under the ad hoc regulatory takings framework not only makes investors uncertain "whether or not damages will be paid," but also, if damages are not paid, means that "investors will be left bearing the costs of an uninsurable risk." Rose-Ackerman, 88 Colum. L. Rev. at 1700. From the perspective of optimizing the allocation of valuable resources, "[t]o the extent that investors are risk averse, the very incoherence of the doctrine produces inefficient choices." *Ibid.*

The per se rule also creates salutary incentives for governments, discouraging gamesmanship or efforts to reframe traditional "takings" to exploit doctrinal loopholes or ambiguities. Under a per se rule, it does not matter what type of property is appropriated, whether the property owner retains some kind of limited interest, or what the government's rationale for appropriating private property might be; so long as there is physical appropriation, a compensable taking has occurred. See *Tahoe-Sierra*, 535 U.S. at 323 ("we do not ask whether a physical appropriation advances a substantial government interest" under the "clear rule" governing "categorical taking[s]"). Under the panel's interpretation, by contrast, the government can adopt regulations that physically appropriate property without any categorical obligation to compensate the owner, so long as the regulations satisfy—at most—the "nexus and rough

proportionality" principles of *Nollan* and *Dolan*. Pet. App. 23a.

Uncertainty about how the fact-intensive and ad hoc legal standard will be applied to any given set of facts also reduces the government's anticipated cost of a taking, essentially discounting the rate of compensation by the possibility that the factfinder will conclude the government owes no compensation. That uncertainty not only affects the government's choices, but also changes how property owners interact with the government. "By providing a doctrinal shield against the intrusive overregulation of local governments, formal takings rules smooth the 'frictions' caused by the struggles over regulatory indeterminacy and uncertainty, stabilizing and protecting property rights within the present distribution of property ownership and entitlements." Fenster, 92 Cal. L. Rev. at 620.

In short, the Ninth Circuit's decision undermines important interests critical to the protection of private property rights by replacing the certainty of a categorical rule with the fact-intensive, ad hoc, and fundamentally *indeterminate* balancing test of *Nollan* and *Dolan*.

B. The Panel's Exclusion Of Personal Property From Categorical Protection Affects Private Property Rights In A Broad Range Of Contexts

The practical consequences of the decision below sweep far beyond the Depression-era agricultural regulations at issue in this case to affect property

owners in many other areas.[4] Federal and state case reporters are replete with examples of government attempts to appropriate or occupy personal property, highlighting the important and continuing role of a per se rule in protecting property rights. These cases vividly illustrate how the Ninth Circuit's approach creates incentives for strategic behavior, inviting governments to restructure regulations that effect de facto physical appropriation of personal property in a manner that avoids paying just compensation. These cases undercut any suggestion that the practical need for a categorical, per se rule for personal property is any less acute than in the context of real property.

One colorful example arose in *City of Oakland* v. *Oakland Raiders*, 646 P.2d 835 (Cal. 1982). In 1980, the Oakland Raiders franchise of the National Football League announced its intention to move to Los Angeles. In response, the City of Oakland initiated an eminent domain proceeding to prevent the move by "acquir[ing] by eminent domain the property rights associated with [the Raiders'] ownership of a professional football team as a franchise member of the National Football League."[5] *Id.* at 837. The

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[4] Although the government seeks to limit the decision to the facts of this case (Br. in Opp. 21-22), the explicit language of the court's opinion sweeps far more broadly. See Pet. App. 20a ("we see no reason to extend *Loretto* to govern controversies involving personal property"); accord *id.* at 17a.

[5] For a more detailed history, see Leon F. Mead II, *Raiders: $72 Million, City of Oakland: 0...Was That the Final Gun – A Story of Intrigue, Suspense and Questionable Reasoning*, 9 Loy. L.A. Ent. L. Rev. 401 (1989). Maryland similarly authorized the City of Baltimore to use eminent domain to prevent the NFL's Colts franchise from moving to Indianapolis. See Charles Gray.

California Supreme Court held that the Raiders' property interests were condemnable under California law, bringing into sharp focus the importance of constitutional takings protection.

The California Supreme Court never questioned that assuming possession and ownership of the team would constitute a taking.[6] But under the Ninth Circuit's formulation, it is far from clear whether that premise would hold true, given that the various property rights that make up a football franchise (*e.g.*, trademarks, player contracts) were personal, not real, property. Moreover, in the wake of the ruling here, it is not hard to imagine how Oakland could have altered its strategy to fit the panel's loophole. For instance, the City might have demanded a part interest in the team in the event its owners chose to relocate, perhaps in service of a stated goal of regulating the "market" for professional football services. Or the City might have made the team less valuable by taking possession of a certain percentage of the tickets offered for the government's "account," again in the guise of market regulation. Under the

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Keeping the Home Team at Home, 74 Cal. L. Rev. 1329, 1330-1331 & n.14 (1986).

[6] The California high court held that whether taking the team was a "public use" was a jury question; the Raiders ultimately prevailed on public use, antitrust, and Commerce Clause grounds, effectively rejecting the City's attempt to condemn the franchise. See Mead, *supra* note 5, at 406-407. But there is little reason to believe those alternate protections will be present in a typical case. Cf. *Am. Needle, Inc.* v. *Nat'l Football League*, 130 S. Ct. 2201, 2216 (2010) (noting "special characteristics" of National Football League relevant to antitrust analysis).

panel's approach, a court might conclude that such a regulation was a mere "use" restriction that satisfied the "nexus and rough proportionality" test of *Nollan* and *Dolan*, so long as the Raiders were theoretically entitled to any residual value after the City disposed of (or gave away) the tickets.

In *Milwaukee & Suburban Transport Corp.* v. *Milwaukee County*, 263 N.W.2d 503 (Wis. 1978), Milwaukee County condemned the assets of a private bus system and began operating the system under public ownership. See *id.* at 508 ("There was no interruption of service. The same buses were driven on the same routes by the same employees."). Again, it is far from clear that *Milwaukee*'s view of the transaction as a paradigmatic taking, in which the County expressly appropriated the bus system, would survive the panel's holding that *Loretto* applies only to real property. In any event, the County might have restructured its takeover to fall under the balancing-test framework, potentially exempting itself from any obligation to pay compensation. For example, rather than "taking" the entire bus system, the County could have required the private owners to accept a certain number of riders who present bus fares sold by the County—in the vernacular of the raisin marketing order, setting aside for public use a "reserve" portion of all bus seats, which the County could dispose of as it sees fit, perhaps with the possibility of a contingent future benefit to the bus company. The Ninth Circuit's decision here suggests even those egregious actions would not be subject to a per se physical takings test.

Of course, appropriation of personal property can also occur when a government initially seizes prop-

erty for a purpose other than eminent domain. In *Lee* v. *City of Chicago*, police impounded an innocent bystander's private vehicle for investigation because it had been struck by a stray bullet. 330 F.3d 456 (7th Cir. 2003). After the investigation, the owner discovered that the City had painted large red inventory numbers on three sides of the vehicle. *Id.* at 459. Although the case was not litigated on takings grounds, Judge Wood concluded that the plaintiff had "suffered [a] * * * taking: governmental authorities physically took some of his personal property for a public purpose and kept it for a period of time." *Id.* at 474 (Wood, J., concurring). Notably, she cited *Loretto* in concluding that "[a]ny physical occupation is enough [for a taking], even where the owner retains at least some use." *Id.* at 475. But under the Ninth Circuit's analysis, *Loretto* would not apply, because a car is personal, not real, property, and because any takings claim would be relegated to the "nexus and rough proportionality" standard from *Nollan* and *Dolan*, or the ad hoc balancing test for regulatory takings.

To similar effect, the plaintiff in *Innovair Aviation, Ltd.* v. *United States*, 72 Fed. Cl. 415 (2006), *rev'd on other grounds*, 632 F.3d 1336 (Fed. Cir. 2011), was completing the turboprop conversion of certain airplanes that were under contract to Air Colombia when the U.S. government seized the planes, claiming that Air Colombia was a front for drug cartels that allegedly purchased the airplanes with drug proceeds. 72 Fed. Cl. at 416-418. The plaintiff sought compensation for the taking of the planes. *Id.* at 419. The court held that the seizure was a per se taking of the plaintiff's private property,

analogizing to *Loretto* instead of *Penn Central* because "[h]ere we have the total destruction of the Plaintiff's property." *Id.* at 423. Citing *Nixon*, 978 F.2d 1269 (discussed below and at Pet. Br. 34-35), the *Innovair* court rejected the government's contention that the per se takings analysis only applies to real property, noting that there, as in *Nixon*, "the Plaintiff's personal property was permanently and completely appropriated by the Government." 72 Fed. Cl. at 423. *Innovair* ultimately held that the plaintiff had suffered a compensable taking when the government physically occupied its personal property. The panel's analysis would replace that clear-cut approach with a far more uncertain, ad hoc inquiry.

These cases provide just a few examples of how the panel's holding encourages gamesmanship and strategic behavior, as governments will rationally seek to avoid paying compensation. As *City of Oakland* and *Milwaukee* illustrate, governments often have strong financial, practical, or other incentives to appropriate personal property in a wide range of substantive areas, and to disguise the true costs of those choices. One recent Washington, D.C. law prohibited patented drugs from being sold in the District for an "excessive" price, requiring drug manufacturers to rebut a presumption of excessiveness if the price of a drug is more than 30% higher than in the United Kingdom, Germany, Canada, or Australia. See Prescription Drug Excessive Pricing Act of 2005, codified at D.C. Code §§ 28-4551-28-4555. That statute represented a clear attempt to disguise the true fiscal cost of providing a public benefit—shifting the cost of subsidized drugs from taxpayers (who otherwise would have to use public funds) to a drug's in-

ventors and manufacturers. See *Biotechnology Indus. Org.* v. *District of Columbia*, 496 F.3d 1362, 1374 (Fed. Cir. 2007) ("The Act is a clear attempt to * * * diminis[h] the reward to patentees in order to provide greater benefit to District drug consumers."). Under the Ninth Circuit's reasoning, the District could have achieved the same goal by requiring pharmaceutical companies physically to provide low-income residents with patented drugs free of charge.

If this Court upholds the conclusion that *Loretto*'s per se rule is wholly inapplicable to personal property, public officials nationwide will shift their strategy away from forthright use of eminent domain and toward regulatory regimes that achieve a similar practical outcome on the cheap. The decision here opens a back door to abusive government actions, despite this Court's efforts to bar those approaches though per se rules about physical occupation.

C. The Weight Of Well-Reasoned Authority Rejects A Fact-Intensive Balancing Test For Physical Takings Of Personal Property

Well-reasoned authority from numerous other courts rejects the panel's novel conclusion that *Loretto* is categorically inapplicable to "controversies involving personal property" or where property owners retain some contingent benefit from government expropriation, and the panel's attempt to re-characterize the physical appropriation here as a "use" restriction subject to the balancing test from *Nollan* and *Dolan*. Pet. App. 20a; Pet. Br. 31-36. *Amicus* supplements those arguments and identifies

other authorities that counsel rejection of the panel's novel and sweeping approach.

A leading case is *Nixon* v. *United States*, 978 F.2d 1269 (D.C. Cir. 1992), in which the former President challenged regulations promulgated under the Presidential Records and Materials Preservation Act of 1974 effectively "authoriz[ing] the Administrator of General Services to retain complete possession and control of all papers, documents, memorandums, transcripts, and other objects and materials that constitute the presidential historical records of Richard M. Nixon." *Id.* at 1271 (internal quotation marks omitted). The government advanced precisely the same theory adopted by the panel here—only to have the D.C. Circuit squarely reject that approach. Pet. Br. 34-35. The *Nixon* court's reasoning merits close attention, as it continues to be relevant today. Among other things, the court explained that "[t]he rationale for the per se rule is that actual occupation of property obviates an in-depth factual inquiry to determine whether one's economic interests have been sufficiently damaged as to warrant compensation." *Nixon*, 978 F.2d at 1284. And the D.C. Circuit emphasized that this Court's "actual holding [in] *Loretto* makes no mention of a distinction between real and personal property, nor was any rationale given in the opinion that may justify such a distinction." *Id.*

Underscoring the systematic incentives governments have to push the limits of takings law, the court in *Rose Acre Farms, Inc.* v. *United States*, 373 F.3d 1177, 1196 (Fed. Cir. 2004), felt compelled to emphasize that "[t]he trial court correctly rejected the government's contention that a 'per se' takings analy-

sis is never applicable when personal property is at issue." That case involved a complex set of health and food-safety testing requirements for poultry farmers, which included the seizure and destruction of certain chickens by government agents. The Federal Circuit noted that when this Court had been "presented, recently, with the opportunity" to hold that "categorical takings are limited to the taking of real property," it specifically declined to do so in a case involving other personal property (*i.e.*, interest on lawyers trust accounts). *Id.* at 1196 n.17 (citing *Brown* v. *Legal Found. of Wash.*, 538 U.S. 216 (2003)). The Federal Circuit drew particular significance from this Court's "agree[ment]," in *Brown*, "that a per se approach is more consistent" with prior precedent than an ad hoc standard, and that "the transfer of the interest [on the trust accounts] seems more akin to the occupation of a small amount of rooftop space in *Loretto*." *Brown*, 539 U.S. at 235; see generally *Rose Acre Farms*, 373 F.3d at 1196 n.17.[7]

Other courts and judges have reached the same conclusion. In a case involving a takings challenge to a law requiring tobacco companies to disclose trade secrets, Judge Selya explained that "[l]imiting per se takings analysis to cases involving real property is a crude boundary with no compelling basis in the law." *Philip Morris, Inc.* v. *Reilly*, 312 F.3d 24, 51 (1st Cir. 2002) (Selya, J., concurring in the judgment). And, as noted, Judge Wood looked to *Loretto* in analyzing the

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[7] *Rose Acre Farms* ultimately held that the laws at issue did not involve a per se taking. 373 F.3d at 1197. But the Federal Circuit's extensive discussion of *Brown* makes clear that the case should not be read to support the panel's sweeping approach here.

government's "physical occupation" of a portion of a private automobile. *Lee*, 330 F.3d at 474-475.

R.J. Widen Co. v. *United States*, 357 F.2d 988 (Ct. Cl. 1966) (per curiam), is to similar effect. There, a property owner contended that the United States had taken its personal property by constructing a dam and depriving the property owner of a water supply necessary to operate its leather-tanning business—including not only occupation of real property, but also damage to personal property such as tanning supplies and hides damaged as a result of lack of access to water. *Id.* at 991. Although the court found that the specific damage to personal property there represented consequential damages outside the Fifth Amendment's protection, it emphasized that "[u]ndoubtedly, the United States could here have 'taken' plaintiff's personal property and business, in which case just compensation would be due." *Id.* at 993.

In *Seery* v. *United States*, 161 F. Supp. 395, 399 (Ct. Cl. 1958), an opera star sued the United States "for just compensation for the taking by the Army of her real and personal property." The plaintiff alleged damage to her residence, home furnishings, and other personal property when the U.S. Army commandeered her Austrian "castle-like villa" as an officers' rest home during and after World War II. *Id.* at 396. Without any suggestion of applying a complex regulatory takings analysis, the court undertook a straightforward assessment of what personal property the Army had stolen or destroyed, concluded that "a considerable amount of the plaintiff's personal property

was lost or destroyed while in the Army's possession," and awarded damages accordingly. *Id.* at 399.[8]

This approach is not limited to federal courts. *Department of Agriculture & Consumer Services* v. *Mid-Florida Growers, Inc.*, 521 So. 2d 101, 102 (Fla. 1988), found a compensable taking where Florida had destroyed healthy citrus trees to guard against a citrus canker affecting other groves. Citing *Loretto*, the Florida Supreme Court rejected as irrelevant the state's focus on its own "lack of a possessory or proprietary interest in the destroyed property." *Id.* at 103. The *Mid-Florida* court gave no hint that the straightforward takings claim presented there should be analyzed under an ad hoc, factual inquiry.

By concluding that *Loretto*'s per se physical takings rule does not apply to government appropriation of personal property, and by instead treating a physical taking as a mere "use restriction," the panel drew all of these cases into question, and departed from the great weight of precedent, which applies a categorical standard to claims that the government has physically taken personal property. This Court should endorse the majority view and reverse the contrary holding.

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[8] See also *Starr Int'l Co.* v. *United States*, 106 Fed. Cl. 50, 82 (2012) (holding that *Nollan* and *Dolan* "apply only in cases involving land use exactions," in analyzing claim that federal government bailout of American International Group, Inc., constituted taking of corporate stock).

D. The Marketing Order Cannot Be Defended By Strained Analogy To Direct Market Regulation

In seeking to defend the judgment, the government has argued that the raisin marketing order "is effectively indistinguishable" from a hypothetical alternate scheme in which raisin owners retain ownership of their crop, and are free to "dispos[e] of the raisins in a manner approved by the [Committee] * * * " Br. in Opp. 19-20. In essence, the government invites this Court to analyze the marketing order's reserve-tonnage scheme as if it were a different law—that Congress might have established, but did not—merely "limit[ing] the amount of a crop that a farmer can sell * * *." *Id.* at 20.

To begin with, the argument rests on a false premise. The marketing order does not allow raisin producers and handlers to "dispos[e]" of their own reserve-tonnage raisins, but rather requires transfer of physical possession of those raisins, formally designates them for the Committee's "account," and authorizes *the Committee* to dispose of the raisins as it sees fit—including by giving them away. See note 2, *supra*. The marketing order thus deprives the owner of virtually every stick in the bundle of property rights, transferring those rights to the Committee without compensation. A law that merely caps the amount of raisins that a particular grower may sell leaves the "excess" share in the producer's possession and control, and does not transform a producer's fee interest into a vague "equitable" claim to residual net value. The two regimes are not

equivalent in any relevant constitutional or legal sense.[9]

More generally, the government cites no authority for the startling proposition that an unconstitutional law can be made immune from scrutiny simply because the government, in a legal brief (and without record evidence), says its practical effects are similar to those of a different kind of regulation. For example, this Court has "repeatedly found takings where the government, by confiscating financial obligations, achieved a result that could have been obtained by imposing a tax." *Koontz* v. *St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2601 (2013) (citing, *e.g.*, *Brown* v. *Legal Found. of Wash.*, 538 U.S. 216, 232 (2003)), accord *Loretto*, 458 U.S. at 440 n.19 (similar).

II. The Panel's "Use Restriction" Theory Guts Protections For Personal Property

1. As petitioners explain, the panel ignored the great weight of established precedent when it sought to immunize from constitutional challenge the seizure of a portion of petitioners' raisin crop as a mere "use restriction" (Pet. App. 23a) on personal property,

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[9] In holding that a regulatory prohibition on the sale of eagle feathers was not a taking, *Andrus* v. *Allard* emphasized that the regulations "do not compel the surrender of the [property]," and found it "crucial that [the property owners] retain the rights to possess and transport their property." 444 U.S. 51, 65-66 (1979). Neither factor is present here. In any event, three Justices who joined the majority opinion in *Hodel* v. *Irving*, 481 U.S. 704 (1987), concluded that by "finding a taking" on the facts of that case, *Hodel* had "effectively limit[ed] *Allard* to its facts." *Id.* at 719 (Scalia, J., concurring).

subject only to the balancing test from *Nollan* and *Dolan* previously applied only to land-use permitting exactions. The panel reasoned that the marketing order applies only "insofar as [petitioners] voluntarily choose to send their raisins into the stream of interstate commerce," and suggested petitioners could "avoid" the regulations by "planting different crops, including other types of raisins, not subject to this Marketing Order or selling their grapes without drying them into raisins." *Id.* at 25a-26a.

The notion that the government may condition a business's participation in the market on its willingness to transfer a significant percentage of its goods to the government without compensation is a grave threat to private property rights. That theory admits to no principled limitation, and could justify a range of confiscatory actions, from a requirement that farmers give up 50% of their acreage or other property rights as a condition of selling their crops, to a law that takes physical possession of half the cars from an automaker's assembly line as a "use restriction" on selling them in commerce. The dire implications of the panel's "use restriction" theory for property owners nationwide cannot be overstated.[10]

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[10] The government would doubtless reject the possibility that petitioners could avoid the marketing order by disposing of their raisins in the *intra*state market. See 7 U.S.C. § 608c(1) (defining regulatory authority to reach handling of agricultural products "which directly burdens, obstructs, or affects, interstate * * * commerce"); 7 C.F.R. § 989.15 (defining covered raisin "handler[s]" to include "any person who places, ships, or continues natural condition raisins in the current of commerce from within the area to any point outside thereof"). Compare also *Wallace* v. *Hudson-Duncan & Co.*, 98 F.2d 985, 989 (9th Cir. 1938) (rejecting takings challenge to walnut marketing

2. In addition to its sweeping practical implications, the panel's "use restriction" theory lacks any sound basis in precedent. Most notably, it contravenes *Loretto*'s explicit instruction that "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation." 458 U.S. at 439 n.17. Indeed, the panel's holding is difficult to distinguish from obviously prohibited practices the Court recognized such a rule would permit, such as "allow[ing] the government to require a landlord to devote a substantial portion of his building to vending and washing machines, with all profits to be retained by the owners of these services and with no compensation for the deprivation of space." *Ibid.* So too here. Accepting the Ninth Circuit's "use restriction" theory would essentially condition petitioners' right to dispose of their personal property on their "agreement" to forfeit compensation for a physical appropriation of a portion of that property. Condoning that theory would open the door to countless other abusive government tactics that seek to exploit private property for public use, without compensation. But as this Court has recognized, "[t]he right[s] of a property owner * * * cannot be so easily manipulated." *Ibid.*

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order on ground that grower could "choos[e] not to comply with the interstate requirements of the Order, [and] nevertheless retain all its walnuts intrastate and dispose of them to intrastate buyers"), with *Gonzales* v. *Raich*, 545 U.S. 1, 17 (2005) ("Our case law firmly establishes Congress's power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce.").

Courts have long enforced the requirement to pay just compensation without any hint that this core constitutional obligation could be sidestepped through government semantics. In *Omnia Commercial Co.* v. *United States*, 261 U.S. 502, 511 (1923), this Court confirmed that a steel company would be entitled "to the just compensation guaranteed by the Constitution" where the government had requisitioned all its steel output. The Court gave no suggestion that such a takings claim would be defeated by the possibility that the steel company could choose to produce a different product.

Similarly, *Liggett & Myers Tobacco Co.* v. *United States*, 274 U.S. 215, 220 (1927), sustained a takings claim, and the obligation to pay full compensation, where the government requisitioned the personal property of "tobacco products" from a manufacturer. The government could not avoid compensation simply by re-characterizing the "compulsory" requisition order as a mere contractual "offer to purchase." *Ibid.* And *United States* v. *New River Collieries Co.*, 262 U.S. 341 (1923), upheld a takings claim where the government "requisitioned * * * upwards of 60,000 tons of bituminous coal," *id.* at 342. This Court never suggested that the Takings analysis would involve anything other than straightforward, market-value compensation for the personal property that had been seized.

The same principle is reflected in lower-court decisions today. *A&D Auto Sales, Inc.* v. *United States*, 748 F.3d 1142 (Fed. Cir. 2014), sustained the viability of takings claims based on the federal government's alleged coercion of General Motors and Chrysler to cancel franchise agreements with certain

local dealerships, in exchange for federal financial assistance. In affirming the district court's denial of the government's motion to dismiss, the court gave no suggestion that the government could avoid takings liability simply by inviting the plaintiff auto dealers to "avoid" harm by selling other brands of automobiles. *Cf.* Pet. App. 25a-26a.

Turney v. *United States*, 115 F. Supp. 457 (Ct. Cl. 1953), held that a takings claim was actionable where the Philippines had forbid exportation from that country of certain U.S. military surplus equipment, which the United States had previously sold the plaintiffs at auction. The Court of Claims gave no suggestion that the plaintiffs' takings claim would be defeated by the possibility that they might elect to sell something other than military equipment, or sell their surplus property within the Philippines. *Id.* at 463-464.

3. Shielding the marketing order from constitutional scrutiny by re-characterizing it as a "use restriction" violates the fundamental principle that the Takings Clause "bar[s] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960); accord Carlos A. Ball & Laurie Reynolds, *Exactions and Burden Distribution in Takings Law*, 47 Wm. & Mary L. Rev. 1513, 1534 & n.104 (2006) (*Armstrong* formulation "endorsed in almost every important takings opinion of the last thirty years"). The order challenged here does not merely regulate the domestic raisin market, but allows the government to use raisins to further various national policies, such as directing raisins to be used by sale or

gift to U.S. agencies, school lunch programs, foreign governments, charitable organizations—or even raisin farmers themselves, for export. See 7 C.F.R. §§ 989.67(b)(2)-(4). The panel opinion effectively freed the government to pursue those initiatives on the cheap—without the need to use tax dollars to pay for the raisins distributed.

Taking physical possession of petitioners' raisins as a condition of their participation in the domestic market places the entire burden of implementing those government policies on raisin producers and handlers, rather than the public. The rule is easily generalizable—by the same logic, the government might require airlines to "reserve" a certain percentage of seats to be provided to government employees for free or a substantial discount, thus shifting the cost for government travel from the public to the airlines. Condoning the panel's "use restriction" theory would permit government entities to shift the burden of a broad variety of government programs from the public to private property owner. That fundamentally conflicts with the Takings Clause's core constitutional guarantee.

CONCLUSION

The judgment should be reversed.

Respectfully submitted.

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MARCH 2015

Supreme Court, U.S.
FILED
MAR 9 - 2015
OFFICE OF THE CLERK

No. 14-275

In the Supreme Court of the United States

MARVIN D. HORNE, ET AL.,
Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

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QUESTIONS PRESENTED

The Takings Clause of the Fifth Amendment imposes a "categorical duty" on the federal government to pay just compensation when it "physically takes possession of an interest in property." *Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012) (internal quotations omitted).

1. Did the United States Court of Appeals for the Ninth Circuit err when it held that this duty applies only to takings of real property, and not personal property?

2. Did the United States Court of Appeals for the Ninth Circuit err when it held that no taking occurs when there exists the possibility that the condemnee may receive in-kind benefits as a result of the government's actions?

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INTEREST OF AMICI CURIAE[1]

Amici curiae are scholars who teach, research, and write about constitutional and property law. They share the view that the Takings Clause of the Fifth Amendment to the U.S. Constitution has always been understood to: (1) apply equally to both real and personal property and (2) apply regardless of whether physical confiscation of the property may create in-kind benefits for its owner. Accordingly, amici believe that this Court should reverse the Ninth Circuit, make clear that the Takings Clause applies equally to all private property, and clarify that in-kind benefits do not automatically render *per se* takings constitutional.

Amici include Thomas W. Bell, Professor of Law at the Chapman University Dale E. Fowler School of Law; James W. Ely Jr., the Milton R. Underwood Professor of Law Emeritus and Professor of History Emeritus at Vanderbilt University; Nicole Stelle Garnett, the John P. Murphy Foundation Professor of Law at the University of Notre Dame; J. Gordon Hylton, Professor of Law at Marquette University; Daniel B. Kelly, Professor of Law at the University of Notre Dame; Donald Kochan, the Associate Dean for

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[1] Pursuant to Supreme Court Rule 37.6, amici curiae states that no counsel for any party authored this brief in whole or in part, and that no person or entity other than amici curiae or their counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for respondent and petitioners in this case have filed a letter pursuant to Supreme Court Rule 37.3(a) reflecting consent to the filing of amicus curiae briefs in support of either party.

Research & Faculty Development and Professor of Law at the Chapman University Dale E. Fowler School of Law; Adam Mossoff, Professor of Law at the George Mason University School of Law; and Ilya Somin, Professor of Law at the George Mason University School of Law.

SUMMARY OF THE ARGUMENT

"The political institutions of America opened a certain resource to the unfortunate and to the enterprising of every country and ensured to them the acquisition and free position of property." Thomas Jefferson, *Declaration on Taking Up Arms* (1775), *reprinted in* 2 *The Works of Thomas Jefferson* 113 (Paul Leicester Ford ed., 1904).

Protecting private property has been a central aim of our system of government since the Founding. As Alexander Hamilton explained at the Constitutional Convention of 1787, "one great obj[ect] of Gov[ernment] is [the] personal protection and security of Property." 1 *Records of the Federal Convention of 1787*, at 302 (Max Ferrand ed., 1911).

It seems that the Ninth Circuit has forgotten this core tenet of our constitutional system.

It crippled the Takings Clause, holding that it applies fully only when the government has confiscated *real* property. This holding comports with neither the original understanding of the Takings Clause's scope, nor the manner in which it has been applied in the intervening centuries.

And the Ninth Circuit compounded this error by holding that the potential for in-kind benefits insulates the government's categorical condemnations from scrutiny. In doing so, the Court of Appeals forgot a fundamental precept of takings theory: in the event of a physical taking, the question whether there has been a taking of private property is distinct from the question whether just compensation has been provided.

This Court should reverse the Ninth Circuit.

ARGUMENT

The Takings Clause of the Fifth Amendment provides that "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

The Ninth Circuit took this simple statement and concluded: (1) that the "Clause affords more protection to real than to personal property," Pet. App. 18a,[2] and (2) that the Clause's protections are lesser when the government's action might "inure[] to the [condemnee's] benefit," Pet. App. 22a. Accordingly, it held that the categorical requirement that just compensation be provided for property expropriated by the government does not apply when the property in question is personal property or when the property owner may receive implicit in-kind benefits from the public use.

But this holding was unmoored from history and logic.

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[2] In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), this Court noted that personal property *might* be treated differently than real property for Takings Clause purposes. *Id.* at 1027-28. This observation is inapposite for at least two reasons. First, it was dicta. Second, it was made in the context of regulatory takings that reduce the value of the property in question; the argument does not extend to situations where the government confiscates the property in question outright, as is the case here.

I. The Constitution Draws No Distinction Between Real and Personal Property.

When interpreting the Constitution, one document proves more helpful than any other: the Constitution. The Ninth Circuit's distinction between real and personal property finds no support in the text of the document.

A. The Text of the Takings Clause Itself Draws No Distinction Between Types of Property.

The Takings Clause states plainly that that "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

Absolutely nothing in its text supports the Ninth Circuit's judicially invented limitation of the Clause to only real property. If the Framers wished to limit its reach to real property, they could have said just that. But they did not. *See* § I.B.3 *infra*.

This lack of a textual hook alone provides reason enough to reject the Ninth Circuit's attempt to limit the Clause's protections.

B. Other Clauses of the Constitution Suggest That the Takings Clause Applies to More Than Just Real Property.

1. The Takings Clause is not the only place the Framers used the word "property" in the Fifth Amendment. The Due Process clause states that "nor shall any person be deprived of life, liberty, or property without due process of law." U.S. Const. amend. V

Again, there is no language limiting the due process right to real property in the text. This Clause has been interpreted time and time again to apply to more than just land. *See, e.g., Goldberg v. Kelly*, 397 U.S. 254, 262 n.8, 266 (1970) (explaining that "[i]t may be realistic today to regard welfare entitlements as more like 'property'," and concluding that procedural due process requires that a pretermination evidentiary hearing be held when public assistance payments to a welfare recipient are discontinued). But a consistent application of the Ninth Circuit's reading of the text yields the perverse rule that the State can deprive its citizens of anything they own (with the exception of land) without proper process.

2. Section 3 of Article IV of the Constitution, the "Property Clause," grants to Congress the power to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3.

Nothing in the plain text limits the scope of the Clause to real property, and the use of the broad modifier "other" suggests that anything that could be described as "property" would fall within its scope. This reading of the Clause makes intuitive sense. Congress needs power to make rules regarding more than just federally owned lands; it needs the power to make rules regarding federally owned chattels as well.

3. The Constitution refers explicitly to land on multiple occasions. *See, e.g.*, U.S. Const. art. I, § 8 ("The Congress shall have the power to make rules concerning Captures on Land and Water."); U.S. Const. art. III, § 2 ("The judicial Power shall ex-

tend to . Controversies between Citizens of the same State claiming Lands under Grants of different States.").

The Framers knew how to make reference to real property when they wanted to limit the government's powers to lands. They did not so here.

II. The Takings Clause Has Always Been Understood to Apply to Personal Property.

James Madison, the author of the federal Takings Clause, wrote in his famous 1792 essay *Property*, "Government is instituted to protect *property of every sort*." James Madison, *Property*, *reprinted in* 14 *The Papers of James Madison* 266-68 (William T. Hutchison et al. eds., 1977) (emphasis added).

The Takings Clause is one of the Constitution's primary methods for ensuring that the government respects individuals' property rights. It has always been understood—by the Founders, as well as prior and subsequent generations—to apply equally to real and personal property.

A. The Clause Was Understood Prior to the Founding to Apply to Personal Property.

A review of the historical record provides ample reason to reject the Ninth Circuit's attempt to gut this core constitutional protection. Its interpretation of the Clause is opposite centuries of historical evidence to the contrary.

1. The Takings Clause's historical roots stem from the laws of England. Englishmen established the basic liberties of English citizens in a series of documents ranging from the Magna Carta to the English Bill of Rights—and as English subjects, the

colonists considered themselves to be vested with those same rights. *See McDonald v. City of Chi., Ill.*, 130 S. Ct. 3020, 3064 (2010) (Thomas, J., concurring).

The first of these foundational documents, the Magna Carta, contained a progenitor of the Takings Clause that required compensation for the taking of property, with no limitation to only real property.

Indeed, the Magna Carta explicitly encompassed chattel in the category of items that could not be confiscated without compensation, stating that "[n]o constable or other bailiff shall take *corn or other provisions* from any one without immediately tendering money therefor." Magna Carta § 28 (emphasis added), *reprinted in* William Sharp McKechnie, *Magna Carta* 329 (2d ed. 1914).

2. This legal protection of an individual's personal property was also manifested in our nation's early history, as evidenced by early colonial documents.

For example, the Massachusetts Body of Liberties of 1641—the colony's first proto-constitution—contained a takings clause providing that "No mans *Cattel or goods of what kinde soever* shall be pressed or taken for any publique use or service, unlesse it be by warrant grounded upon some act of the generall Court, nor without such reasonable prices and hire as the ordinarie rates of the Countrie do afford. And if his *Cattle or goods* shall perish or suffer damage in such service, the owner shall be suffitiently recompenced." Massachusetts Body of Liberties § 8 (1641), *reprinted in* 13 *American Historical Documents 1000-1904*, at 70, 71-72 (2009 ed.).

Similarly, during the Yamasee War—an early eighteenth-century conflict between colonial South Carolinians and certain Native American tribes—the

colony of South Carolina passed legislation authorizing the confiscation of various forms of property including horses, boats, and "any quantity of goods and other necessaries for the service of the war." An Act to Appoint A Press Master (1716), *reprinted in* 2 Thomas Cooper, *Statutes at Large of South Carolina* 680, 681 (1837 ed.). The owners of confiscated personal property were entitled to "just satisfaction for all damage which may accrue to them while made use of by the publick." An Act for Raising Forces to Prosecute the War Against Our Indian Enemies (1715), *reprinted in* 2 Thomas Cooper, *Statutes at Large of South Carolina* 634, 637 (1837 ed.). *See also* James W. Ely, Jr., *"That Due Satisfaction May Be Made." The Fifth Amendment and the Origins of the Compensation Principle*, 36 Am. J. Legal Hist. 1, 12, 15 (1992).

B. The Clause Was Understood at the Founding to Apply to Personal Property.

1. Our nation's Founders took these principles to heart. Rather than limiting the Clause to apply only to "lands" or "real property," the Founders sought to protect "private property" in the Fifth Amendment. To be sure, the use of the term "private property" leads to the question whether the Founders considered "private property" to include only real property—as the Ninth Circuit would have us believe—or whether it includes both real and personal property. But a review of historical sources confirms that the answer is unequivocally the latter. At the time of the Framing, "private property" included both personal and real property.

William Blackstone—whose works this Court has said "constituted the preeminent authority on English law for the founding generation," *Alden v. Maine*, 527 U.S. 706, 715 (1999)—defined an individual's absolute rights in property as consisting "in the free use, enjoyment, and disposal of *all his acquisitions*, without any control or diminution, save only by the laws of the land." 1 William Blackstone, *Commentaries* *138 (emphasis added).

As Blackstone explained, ownership of "property" means claim and exercise "over the external things of the world, in total exclusion of the right of any other individual in the universe"—a definition which plainly encompassed personal property as well as real property. 2 William Blackstone, *Commentaries* *2.

A review of contemporary dictionaries is also instructive. Samuel Johnson, for example, defined property broadly as "Right of possession," "Possession held in one's own right," and "The thing possessed." 2 Samuel Johnson, *Dictionary of the English Language* (1755 ed.). And Noah Webster defined property as "An estate, whether in lands, *goods or money*," and included by way of example "the productions of [one's] farm or shop." Noah Webster, *American Dictionary of the English Language* (1828) (emphasis added).

2. Madison's view of the Takings Clause's scope is particularly crucial in illuminating the Clause's original meaning. He was, after all, its primary drafter. *See* Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 77-78 (1998).

Significantly, Madison incorporated Blackstone's broad conception of property in his writings on the subject. In his essay *Property*, published just after

the ratification of the Bill of Rights, Madison implicitly incorporated Blackstone's definition of property as "that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual." James Madison, *Property*, *reprinted in* 14 *The Papers of James Madison* 266-68 (William T. Hutchison et al. eds., 1977). Even in what Madison considered the more narrow sense of the word, he defined property as "a man's land, *or merchandize*, or money." *Id* (emphasis added).

Indeed, in Madison's view, it was the purpose of the government to "protect *property of every sort*, as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a just government, which impartially *secures to every man, whatever is his own*." *Id.* (second emphasis added). Not just land, but "property of every sort" and "whatever is his own."

Unsurprisingly, Madison's contemporaries shared his view that the Takings Clause protected property of all types. John Jay, for example, publicly denounced the "[p]ractice of impressing Horses, Teems, and Carriages by the military, without the Intervention of a civil Magistrate, and without any Authority from the Law of the Land." John Jay, A Hint to the Legislature of the State of New York (1778), *reprinted in* 1 *John Jay: The Making of a Revolutionary, Unpublished Papers 1745-1780*, at 461 (Richard B. Morris et al. eds., 1975).

It was with this intent that the Takings Clause was written—and that was also how it was understood at the time. In the very first legal treatise written on the Constitution, St. George Tucker ex-

plained that the Takings Clause was enacted "to restrain the arbitrary and oppressive mode of obtaining *supplies* for the army, and other public uses." 1 St. George Tucker, *Blackstone's Commentaries* app. at 305-06 (1803) (emphasis added).

C. Since the Founding, the Takings Clause Has Been Consistently Applied Equally to Personal Property and Real Property.

The way that the Takings Clause, and those of its state counterparts, have been applied after the Founding generation further confirms that the Clause has *always* applied equally to personal property.

1. In 1871, this very Court affirmed this understanding of the Takings Clause. In *United States v. Russell*, 80 U.S. 623 (1871), one of the first cases to interpret the Clause directly,[3] this Court held that it required the federal government to provide compensation for steamships confiscated as part of the Civil War effort. *Id.* at 627, 630 ("Beyond doubt such an obligation raises an implied promise on the part of the United States to reimburse the owner for the use of the steamboats "). A steamboat, of course, is not real property. And since that decision, courts have consistently held the confiscation by the government of personal property, not just real property, constitutes a *per se* taking. *See, e.g.*, Pet. Br. 33-36.

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[3] Supreme Court interpretation of the Takings Clause prior to Reconstruction is sparse, in part because Congress did not authorize the federal government to exercise the power of eminent domain until the 1860s. *See Kohl v. United States*, 91 U.S. 367, 373 (1875).

2. The federal government is not alone in protecting the right to personal as well as real property. From the nineteenth century on, courts have consistently held that the state analogues to the Takings Clause applied equally to all sorts of property, not just real property.

For example, the Massachusetts Constitution of 1780 provided that "whenever the public exigencies require, that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor." Mass. Const. of 1780, part I, art. X, *reprinted in Popular Sources of Political Authority: Documents on the Massachusetts Constitution of 1780* (Handlin & Handlin eds., 1966).

And in one of the earliest cases to interpret that language, the Massachusetts Supreme Court determined that it applied to chattel, as well as real property. *Perry v. Wilson*, 7 Mass. 393 (1811). Specifically, the court held that the state constitution required compensation for logs taken for canal construction. *Id.* at 394-95. Four decades later, Chief Justice Lemuel Shaw confirmed this broad understanding of the Commonwealth's takings provision, stating that it applied broadly to "every valuable interest which can be enjoyed as property and recognized as such." *Old Colony & Fall River R.R. v. Cnty. of Plymouth*, 80 Mass. 155, 161 (1859); *see also Miller v. Horton*, 152 Mass. 540, 547-48 (1891) (Holmes, J.) (holding that a healthy horse killed as part of program to control glanders was taken for public use).

3. Similarly, personal property has long received the same constitutional protection as real property. *See Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972) ("The right to enjoy property without unlawful

deprivation, no less than the right to speak or the right to travel, is in truth, a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account."). The caselaw demonstrates that many forms of property besides real property have been considered constitutional private property under various takings clauses, including intangible property like patents and franchises.

Regarding intellectual property, "the nineteenth-century jurisprudence was quite clear: patents were private property rights secured under the Constitution." Adam Mossoff, *Patents as Constitutional Private Property: The Historical Protection of Patents Under the Takings Clause*, 87 B.U. L. Rev. 689, 700-11, 711 (2007); *see also McKeever v. United States*, 14 Ct. Cl. 396, 421 (1878) (patents secured under Takings Clause). This belief has persisted to more recent times. In *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984), this Court held that trade secrets are secured as "private property" under the Takings Clause. *Id.* at 1003-04 (holding that Monsanto has "a trade-secret property right under Missouri law, [and] that property right is protected by the Taking Clause of the Fifth Amendment" and citing scholars such as Blackstone and John Locke for the proposition that "property" subsumes all things that arise from "labour and invention").

And as to franchises, this Court held in *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893), that the owner of a lock and dam, who also owned a "vested franchise to receive tolls for its use," was entitled to just compensation for the taking of both the real property *and the franchise*. *Id.* at 344-45. In reversing the trial court, which had granted

compensation for only the lock and dam itself, this Court stated "[s]uch a franchise was as much a vested right property as the ownership of the tangible property," and that "just compensation requires payment for the franchise to take the tolls, as well as for the value of the tangible property." *Id.*[4]

As the late-nineteenth century law professor and Michigan Supreme Court Justice Thomas Cooley noted, "[e]very species which the public needs may require is subject to be seized and appropriated under the right of eminent domain," including: "timber, stone, and gravel." Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 646 (6th ed. 1890). And as Cooley wrote in his influential treatise *General Principles of Constitutional Law in the United States*, "[t]he property which the Constitution protects is anything of value which the law recognizes as such." Thomas M. Coo-

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[4] *See also, e.g., Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 571 (1837) (McLean, J, concurring in result) (noting in a Contracts Clause case, which he believed should have been dismissed for want of jurisdiction, that in granting a charter for the Warren Bridge, the Massachusetts legislature provided compensation to the franchise holders of the Charles River Bridge company); *Enfield Toll Bridge Co. v. Hartford & New Haven R.R.*, 17 Conn. 40, 59-61 (1845) ("The right rests upon the principle, that individual interests must be subservient to that of the public, and that they must yield, when public necessities require. This, however, in constitutional governments, is not to be done, but upon compensation. The principle, then, is broad enough to include all kinds of property."); *Piscataqua Bridge v. N.H. Bridge*, 7 N.H. 35, 66 (1834) ("That franchise, as we have said, is property.").

ley, *General Principles of Constitutional Law in the United States of America* 336 (1880 ed.). Personal property is just that.

Cooley's was not the only nineteenth-century treatise to suggest that all property is subject to condemnation via eminent domain. In his influential *Treatise on the Law of Eminent Domain in the United States*, John Lewis wrote: "All kinds of property, and every variety and degree of interest in property, may be taken under the power of eminent domain." 1 John Lewis, *Treatise on the Law of Eminent Domain in the United States* § 262 (1st ed. 1888). Lewis put it more bluntly in a later edition of his work: "The constitution protects personalty as fully as real estate." 1 John Lewis, *Treatise on the Law of Eminent Domain in the United States* § 62 n.1 (3d ed. 1909).

This understanding is reflected in more recent caselaw as well, in square opposition to the Ninth Circuit's holding in this case.

In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), this Court held unanimously that interest earned on interpleader funds deposited in the registry of a county court in Florida constituted protectable property and that its taking without compensation by the county constituted a violation of the Fifth and Fourteenth Amendments. *Id.* at 164. *Cf. id.* at 161 ("[P]roperty interests are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source[.]") (internal quotations and citations omitted) (omission in original).

In *Phillips* v. *Washington Legal Foundation*, 524 U.S. 156 (1998), this Court held that interest on law-

yers trust accounts is a property right protected by the Takings Clause. *Id.* at 172. If such interest accounts are protected by the Takings Clause—even though far removed from real property—surely raisins are.

And in *Nixon v. United States*, 978 F.2d 1269 (D.C. Cir. 1992), a panel of the D.C. Circuit concluded that President Nixon's private presidential papers were "property" for the purposes of the Fifth Amendment and that their confiscation pursuant to the Presidential Recordings and Materials Preservation Act was a *per se* taking entitling him to just compensation. *Id.* at 1287.

* * *

The historical record unambiguously demonstrates that the government's confiscation of personal property has been considered a compensable *per se* taking prior to, during, and ever since the Founding. The Ninth Circuit's rejection of this unbroken history on the basis of dicta and convoluted legal reasoning was simply wrong. Reversal is required to ensure that the Takings Clause provides the robust protections on property that the Framers intended.

III. The Takings Clause Applies Regardless of Potential In-Kind Benefits.

The Ninth Circuit also committed a second fundamental error in this case, when it held that no taking had occurred because "the Hornes did not lose all economically valuable use of their personal property." Pet. App. 20a. It reached this conclusion by blurring

clear lines laid out by this Court's takings jurisprudence. This was in error.

Where there has been a *per se* appropriation of property,[5] the receipt of implicit, in-kind benefits—defined by scholars as the amount of compensation that property owners receive "in kind" as a result of the exercise of eminent domain—is irrelevant to the threshold question whether a taking has occurred. *See* Richard Epstein, *Takings: Private Property and the Power of Eminent Domain* 195-99 (1985) (hereinafter, "*Takings*").

The degree to which a land use disperses benefits back to the public may impact the amount of in-kind compensation that a landowner is entitled to. For instance, where the value of the in-kind benefits received fails to even approach the value of the property lost, a slight diminution in the amount of compensation owed *may* be appropriate. *See Bauman v. Ross*, 167 U.S. 548, 574-75 (1897) (noting that early eminent domain precedents support the conclusion that specific and direct benefits received by a condemnee can be subtracted from his compensation); *see also Takings*, 195-97; Frank I. Michelman, *Prop-*

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[5] This case involves a *per se* physical taking. The Raisin Marketing Order mandates the transfer of ownership of raisins to the federal government's designee, a forced transfer of an owner's title to physical goods. We, therefore, limit our commentary to the realm of *per se* physical takings and do not address regulatory takings. *Cf. Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 323-24 (2002) (holding it is "inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa").

erty, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law, 80 Harv. L. Rev. 1165, 1218, 1255 (1967).

But it is irrelevant to the question whether there has been a taking at all.[6]

The Ninth Circuit forgot this maxim. Instead, it considered that the Hornes may receive implicit in-kind compensation to determine whether there had been a taking. That the Hornes may have received a benefit from the Raisin Administrative Committee (RAC), then, insulated the government's action from takings scrutiny in the Ninth Circuit's opinion.

In so holding, the Ninth Circuit forgot an "oft-overlooked lesson about takings law: one must carefully distinguish between the question whether there is a taking of private property for public use from the

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[6] Theory and caselaw distinguish between "general" and "specific" benefits. 3 *Nichols on Eminent Domain* § 8A.01. If a benefit received by the property owner is common with the entire community or general public—rather than just by himself—the benefit is general and its value not offset against the fair-market-value compensation owed. *Id.* § 8A.02. Subtracting that value from his compensation would place him in a worse position than a neighbor who received benefits without losing her property and would be fundamentally unjust. Indeed, the primary purpose of the Takings Clause is "to bar the Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). But a property owner who receives a disproportionally greater share of benefits than those similarly situated should receive a reduced amount of money in return. He should be deemed to have received benefits that can be offset against the "fair compensation" he is to receive. *See Bauman*, 167 U.S. at 583-84 (1897).

very different question whether just compensation has been provided." Gary Lawson & Guy Seidman, *Taking Notes: Subpoenas and Just Compensation*, 66 U. Chi. L. Rev. 1081, 1085 (1999). "[T]he issue of compensation—and hence of implicit in-kind compensation—can be reached *only if* there has been a taking of private property." *Takings*, at 198 (emphasis added); *see also Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, at 437-48 (1982).

Conflating these inquiries, or addressing them in the wrong order, has serious consequences. It allows the courts to whitewash the fact that the State has committed unconstitutional overreach by finding that just compensation has already been received. But that cannot mean that a taking has not occurred. It is pure legal fiction to assume that there is no impact on the condemnee's property or rights. The fact remains that the property owner has lost ownership and control of something which was once his and that the Constitution protects his property rights.

For example if the government were to confiscate a portion of coastal land to build a fort, the owner of that land would plainly benefit because the fort makes the rest of her property more secure from attacks by sea. But we would still say that a taking has occurred and consider whether the value of the increased security should be considered "just compensation." (And eventually we would decide that she should not be required to bear that burden on behalf of all coastal dwellers. *See Armstrong v. United States*, 364 U.S. 40, 49 (1960). (The primary purpose of the Takings Clause is "to bar the Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by

the public as a whole.")). The same rationale applies to personal property. If provisions are taken from a private farmer to feed the troops at the fort, would we say that the farmer is owed no compensation because the farmer benefits from the protection the well-fed troops provide?

This case presents a paradigmatic example of what can happen when Courts make this error. The Ninth Circuit concluded that the government's expropriation of the raisins did not constitute a taking because the Hornes retained an "equitable stake" that "funds the administration of an industry committee tasked with (1) representing raisin producers, such as the Hornes, and (2) implementing the reserve requirement, the effect of which is to stabilize the field price of raisins." Pet. App. 21a. But that the RAC may act for the benefit of all raisin producers, as well as the public-at-large, does not insulate its actions from being labeled a taking.

By first considering whether the Hornes received in-kind benefits—the value of which may or may not offset the value of their confiscated raisins—the Ninth Circuit deprived them of the possibility of receiving any compensation whatsoever. The Fifth Amendment entitles the Hornes to compensation that is "just," and while that compensation may be lessened as a result of the implicit in-kind benefits received, *see Bauman*, 467 U.S. at 574-75, these benefits cannot zero out their damages as a matter of course.

Allowing the Ninth Circuit's error to stand uncorrected would alter the takings landscape and could substantially weaken the protections provided by the Takings Clause. Once a government knows that it

can take property without having to compensate its owner, simply by pointing to the possibility that in-kind benefits may inure to the owner, what government would be foolish enough to ever compensate its citizens?

CONCLUSION

The Court should reverse the judgment of the U.S. Court of Appeals for the Ninth Circuit.

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DATED: March 9, 2015

FILED
MAR 9 - 2015
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 14-275

IN THE

Supreme Court of the United States

MARVIN D. HORNE, ET AL.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE DKT LIBERTY PROJECT AND THIRTY-THREE INDEPENDENT RAISIN GROWERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*

Thomas Jefferson warned that "[t]he natural progress of things is for liberty to yield, and government to gain ground." Letter from Thomas Jefferson to Edward Carrington (May 27, 1788). Mindful of this trend, The DKT Liberty Project was founded in 1997 to promote individual liberty against encroachment by all levels of government. This not-for-profit organization advocates vigilance over regulations of all kinds, particularly those that unduly interfere with the property rights of private individuals. The DKT Liberty Project has participated as *amicus* in this Court several times in the past, including in cases raising government takings issues, such as *Kelo v. City of New London*, 545 U.S. 469 (2005).

Joining The DKT Liberty Project as *amici* are thirty-three independent California raisin growers ("the Growers")[2] whose crops are subject to the Raisin Marketing Order at issue in this case. The Growers produce raisins on small vineyards ranging

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[1] All parties have consented to the filing of this brief. Petitioners' and Respondent's letters of consent have been filed with the Clerk's office. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to this brief's preparation or submission.

[2] The Growers are identified individually in Appendix A to this brief ("App. A").

from 15 to 240 acres, which they have tended for an average of over 30 years. Many of the Growers carry on a multi-generational tradition of raisin growing in their families; indeed, some are third- or fourth-generation growers, and others continue family businesses dating back over 100 years. *See generally* App. A.

The Growers expend considerable resources in cultivating and harvesting their raisin crops each year. Only after they have expended these resources and harvested their crops do the Growers receive notice of the "reserve tonnage" of raisins their handlers will be compelled to segregate and then turn over to the Raisin Administrative Committee ("RAC")—an arm of the United States Department of Agriculture—to comply with the requirements of the Raisin Marketing Order at issue in this case. This "reserve tonnage" requirement is established by the RAC on an annual basis and requires that Growers essentially give away a part of their raisin crop to the federal government each year. The Growers often forego not only the profits they would otherwise earn from the sale of those "reserve tonnage" raisins, but also their costs of production. Consequently, many of the Growers have resorted to taking second jobs or even to selling off acreage as a means of financing continued raisin production on what remains of their vineyards. *See* App. A at 1a-8a, 10a-11a, 13a, 15a-16a. The Growers thus have significant personal and economic interests in the outcome of this case.

SUMMARY OF ARGUMENT

The Raisin Marketing Order[3] effectuates a direct, physical taking of a percentage of the Growers' raisin crops. *See* 7 C.F.R. §§ 989.65-66. The Fifth Amendment requires that the Growers receive just compensation for this taking, and the Ninth Circuit panel erred in concluding otherwise. The panel did so based on a fundamental misunderstanding of Petitioners' and the Growers' enterprises and on a corresponding mischaracterization of the challenged reserve requirement as a mere condition on one particular "use" of their raisin crops—a condition that actually conveys some "benefit" to raisin growers. The panel further relied on a distinction between real and personal property that lacks foundation in the relevant case law, and one that proves particularly meaningless in this context.

This Court's precedent does not support the panel's reasoning. The Court should therefore reverse the panel's judgment, clarifying that personal property enjoys the same Fifth Amendment protections as real property and that the government cannot condition entry into the stream of commerce on a willingness to relinquish the right to just compensation. In doing so, the Court would remedy a longstanding constitutional violation that not only

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[3] *Handling of Raisins Produced from Raisin Variety Grapes Grown in California*, 14 Fed. Reg. 5136 (Aug. 18, 1949) (codified, as amended, at 7 C.F.R. Part 989) ("Raisin Marketing Order" or "Order").

results in a significant hardship to independent raisin growers, but also threatens to infect the regulatory schemes governing many other industries as well.

ARGUMENT

I. The Raisin Marketing Order Does Not Benefit The Growers, But Rather Places A Substantial And Disproportionate Burden On Them.

The Raisin Marketing Order mandates a direct, physical taking of the Growers' raisin crops with no guarantee of compensation, let alone just compensation. Small, independent growers shoulder a disproportionate share of this substantial burden. Raisin handlers—corporations that buy the raisins from growers and pack and prepare the raisins for sale—often receive direct compensation for the work required of them under the Order, as well as export subsidies. Growers do not. Nonetheless, the panel and the government insist that raisin growers receive a "benefit" from being forced to surrender their property under the Order. The panel and the government further assert that the growers voluntarily assume the burdens of the Raisin Marketing Order by choosing to grow raisins. As shown below, however, there is no benefit to the Growers from the Raisin Marketing Order, and the Growers' supposed "choice" to grow raisins was not a choice to surrender their property to the government.

A. The Raisin Marketing Order Imposes A Significant And Disproportionate Burden And Confers Little To No Benefit On Independent Growers.

The unique and "draconian" reserve requirement imposed under the Raisin Marketing Order results in direct financial losses to raisin growers' operations. *Evans v. United States*, 74 Fed. Cl. 554, 555-56 (2006), *aff'd*, 250 F. App'x 321 (Fed. Cir. 2007); *see* Pet. 4-7. Although the Raisin Marketing Order technically applies only to handlers, *see* 7 C.F.R. §§ 989.65, 989.66(a), (b)(1), its negative impact is suffered almost exclusively by growers. *See* Sun-Maid Growers of California, Petition to Amend and Request an Amendment Hearing Applicable to the California Raisin Marketing Order No. 989 or in the Alternative, to Suspend Its Volume Regulation Provisions 2 (U.S. Dep't of Agric., Nov. 17, 2014) [hereinafter Sun-Maid Petition] ("It is recognized that technically, the Order regulates handlers. But it must also be recognized that our grower-members are economically impacted by the Order's provisions.").

The panel's view that the Raisin Marketing Order provides some "benefit" to raisin growers, either from contingent compensation or from supposed market stabilization, Pet. App. 21a-22a, is simply incorrect as a matter of fact; as a matter of law, it cannot support the government's taking in any event. In view of the numerous years during which growers received no compensation at all for the reserve raisins, and of the raisin industry's successes in more

recent years during which no reserve requirement has been imposed, it is unclear what, if any, "benefit" the Raisin Marketing Order provides. As long as the Raisin Marketing Order still stands, however, the threat of a reserve requirement—and with it, the burden of economic uncertainty—remains.

1. As further explained below, the raisin-growing cycle is such that raisin growers normally harvest their raisins in late August or September. *See infra* at 16. The raisins are then delivered to raisin "handlers," who pack the raisins and prepare them for sale. On February 15 of every year, the RAC establishes the final "free" and "reserve percentages" that will apply to all handlers and, by extension to all raisin growers. 7 C.F.R. § 989.54(d); *see Evans*, 74 Fed. Cl. at 557. The RAC establishes the "free tonnage" percentage based on its assessment of the quantity of raisins it believes the industry can sell worldwide. 7 C.F.R. § 989.54(a). The remainder of the raisins are designated as "reserve tonnage." Handlers pay raisin growers market prices only for the free tonnage; growers receive no payment from handlers for the reserve tonnage. *See Evans*, 74 Fed. Cl. at 557.

The handlers must physically segregate the "reserve tonnage" raisins ("reserve raisins") and hold them "for the account" of the RAC. 7 C.F.R. §§ 989.65, 989.66(a), (b)(1), (b)(4). Title to these raisins thus passes directly from the raisin growers to the

RAC.[4] *See Evans*, 74 Fed. Cl. at 557. Thereafter, the RAC controls the disposition of the reserve raisins entirely at its discretion. It "may, after giving reasonable notice, require a handler to deliver to it, or to anyone designated by it, . . . the reserve tonnage raisins held by such handler." 7 C.F.R. § 989.66(b)(4). It may then direct the reserve raisins wherever it sees fit. For example, the RAC may instruct that they be sold or sent as gifts to U.S. agencies, foreign governments, or charitable organizations. *See id.* § 989.67(b)(2)-(4). Alternatively, the RAC may sell reserve raisins to handlers for resale in export markets. *See id.* § 989.67(c)-(e). After an initial delay, it also may allow handlers to sell reserve raisins as free tonnage in

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[4] In its brief in opposition to the petition for certiorari, the government implausibly contended that the Order does not divest growers of title to the reserve raisins. USDA Br. in Opp'n at 6. As Petitioners demonstrated, however, the government had previously adhered to the opposite position—that title to the reserve raisins "passes, as a matter of law from the producer to the Raisin Administrative Committee." Pet'rs' Br. at 23 (quoting Tr. of Oral Arg., *Horne v. U.S. Dep't of Agric.*, 133 S. Ct. 2053 (2013) (No. 12-123)). Regardless, even if formal title to the reserve raisins remained with the growers, there can be no dispute that physical possession of and control over those raisins do not. No more is required to trigger entitlement to just compensation under the Fifth Amendment. *See id.* at 24 (citing, *inter alia*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 431 (1982)).

domestic markets. *See id.* § 989.54(g). Even for these raisins, growers receive no direct, market-based compensation.[5]

Although raisin handlers are the parties to whom the Raisin Marketing Order technically applies, handlers suffer comparatively minimal burdens in connection with the reserve requirement. Handlers receive direct compensation for segregating and storing the reserve tonnage each year, *see* 7 C.F.R. § 989.66(f), as well as generous export subsidies in many cases, *see id.* § 989.67(c)-(e). Thus, many larger raisin growers have integrated their businesses such that they also act as raisin handlers. Larger growers often "own, lease, or control substantial raisin acreage and are vertically integrated with their own packinghouses," enabling them "to store but not deliver their raisins at their

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[5] In computing the annual reserve tonnage, the RAC employs a method that "arbitrarily reduces the prior year's shipments by 10 percent." Clyde E. Nef, *The Raisin Industry Federal Marketing Program*, *in Raisin Production Manual* 9, 11 (L. Peter Christensen ed., 2000); *see* 7 C.F.R. § 989.54(a) ("The trade demand shall be 90 percent of the prior crop year's shipments of free tonnage and reserve tonnage sold for free use for that varietal type."). The RAC then offers the additional stock to handlers to enable them to maintain the same shipment volume as the previous year and to allow for market growth. "Any unsold tonnage from these offers remains in the reserve pool," *Raisin Production Manual* at 11, and therefore provides no separate basis for compensation to raisin growers.

packinghouses" and thereby "bridge between crop years," choosing when to deliver a particular year's crop based on the free tonnage levels. Sun-Maid Petition at 5. As handlers, these operations may also receive significant export subsidies from the RAC. *See* 7 C.F.R. § 989.67(c)-(e). Smaller, independent growers typically do not have the resources to integrate their businesses in this way and do not participate in the export market. Thus, "[t]he integrated packer-grower simply has the ability to take advantage of the Order in a way that small growers realistically cannot." Sun-Maid Petition at 5.

2. In stark contrast to handlers, raisin growers receive no guaranteed level of compensation for the labor and resources they dedicate to the reserve raisins. Rather, they are entitled only to an "equitable distribution of the net return" from the sale of those raisins. 7 U.S.C. § 608c(6)(E); *see* 7 C.F.R. § 989.66(h). However, it is only after the RAC's administrative costs have been paid that raisin growers receive, on a pro rata basis, any remaining proceeds. *See* 7 U.S.C. § 608c(6)(E); 7 C.F.R. §§ 989.53(a), 989.66(h). Including compensation to handlers for storage and other services, as well as export subsidies, the RAC's administrative costs total tens of millions of dollars. *See* RAC, *Statement of Disposition & Grower Equity* (Jan. 31, 2013) (2008-2009 reserve); RAC, *Statement of Disposition & Grower Equity* (Apr. 1, 2011) (2007-2008 reserve); RAC, *Statement of Disposition & Grower Equity* (Feb. 19, 2009) (2006-2007 reserve); RAC, *Statement of Disposition & Grower Equity* (Feb. 19, 2009) (2005-2006 reserve); RAC, *Statement*

of Disposition & Grower Equity (June 23, 2008) (2003-2004 reserve); and RAC, *Statement of Disposition & Grower Equity* (2002-2003 reserve) (reflecting reserve pool expenses ranging from $26,223,885 to $110,812,968). In years for which no proceeds remain, raisin growers receive no compensation at all for the reserve raisins. Indeed, raisin growers received no compensation at all in the last five years in which the RAC actually imposed a reserve requirement.

The following chart presents, for each of the past six years in which the RAC imposed a reserve requirement, the "reserve percentage," or the percentage of growers' raisins required to be set aside for the RAC; the "sales per reserve ton," or the per-ton amount earned on the RAC's sale of reserve raisins; and the "final grower equity," or the compensation growers ultimately received per ton of their reserve raisins:

Crop Year	Reserve Percentage	Sales Per Reserve Ton	Final Grower Equity
2002-2003	47.0 percent	$ 649.47	$ 27.45
2003-2004	30.0 percent	$ 1,249.30	$ 0.00
2005-2006	17.5 percent	$ 1,262.93	$ 0.00
2006-2007	10.0 percent	$ 1,241.84	$ 0.00
2007-2008	15.0 percent	$ 1,313.75	$ 0.00
2008-2009	13.0 percent	$ 505.79	$ 0.00

See RAC, *Statement of Disposition & Grower Equity* (Jan. 31, 2013) (2008-2009 reserve); RAC, *Statement*

of Disposition & Grower Equity (Apr. 1, 2011) (2007-2008 reserve); RAC, *Statement of Disposition & Grower Equity* (Feb. 19, 2009) (2006-2007 reserve); RAC, *Statement of Disposition & Grower Equity* (Feb. 19, 2009) (2005-2006 reserve); RAC, *Statement of Disposition & Grower Equity* (June 23, 2008) (2003-2004 reserve). The equitable share of the proceeds to which the Growers are entitled thus affords no reliable basis for any compensation, let alone just compensation.

Nor do growers receive any other supposed "benefit" from the Raisin Marketing Order. The Order was ostensibly intended "to stabilize producer returns by limiting the quantity of raisins sold by handlers in the domestic competitive market." *Lion Raisins, Inc. v. United States*, 416 F.3d 1356, 1359 (Fed. Cir. 2005). In its brief in opposition to certiorari, the government contended that the "price-stabilization purposes of the marketing order" had "directly benefited petitioners and other producers." USDA Br. in Opp'n at 25. But the government failed to inform the Court that, even though the long-employed reserve formula dictated that a reserve requirement was necessary, the RAC declined to impose a reserve requirement in each of the past five crop years, thus disproving the assertion that the reserve requirement reflects any economic need. Indeed, Petitioners and other producers have fared well in recent years without government intervention in the market. For the past five years, the raisin industry has successfully marketed its 100 percent free tonnage, *see* Sun-Maid Petition at 6, and for the past two seasons, the industry has managed

to sell the entirety of the crops it produced, *see* Dan Malcolm, *California Raisin Growers Benefit from Sun-Maid Work*, American Vineyard, Jan. 2015, at 18.

Amici Growers' circumstances have markedly improved during this time as well: In the absence of a reserve requirement since 2010, there is "more money coming in," App. A at 14a, and certain Growers have been able to pay farming expenses without taking out personal loans, *id.* at 12a; others can now direct resources toward vine replacements, ground improvements, and efforts to save vines from pest destruction, *id.* at 5a, or toward other improvements in production, including transitioning from hand picking to mechanical harvesting, *id.* at 3a. As one Grower explains, "[i]t is nice to get 100 percent of your crop in income." *Id.* at 9a. As long as the Raisin Marketing Order still stands, however, significant economic uncertainty exists, as the RAC retains the right to impose a reserve requirement year-to-year.

The contention of the panel and the government that the Raisin Marketing Order confers some "benefit" on raisin growers through supposed market stabilization is thus simply untrue, as evidenced by robust sales in the absence of a reserve requirement in recent years. Even if the Order was intended "to stabilize producer returns," *Lion Raisins*, 416 F.3d at 1359, its primary effect has been to introduce substantial uncertainty in grower returns over the years. *See infra* at 17-18. Moreover, even assuming raisin growers would benefit from market

stabilization, the Raisin Marketing Order is ill-designed to achieve that end. A simple restriction on the sale of raisins, akin to restrictions set forth in marketing orders for other crops, could achieve that purpose, without the need to actually "set aside" raisins for the RAC's disposal at below-market prices through government programs or subsidized exports. Regardless, any such "benefit" would not as a matter of law constitute "just compensation" under the Takings Clause, as explained in Part II.

B. The Growers Did Not Choose The Burden Of The Raisin Marketing Order.

To the extent the panel viewed the Raisin Marketing Order as imposing some burden rather than simply conferring a benefit on raisin growers, it blithely asserted that raisin growers could "avoid" that burden "by . . . planting different crops, including other types of raisins, not subject to this Marketing Order or selling their grapes without drying them into raisins." *See* Pet. App. at 26a. The suggestion that Petitioners and Growers can avoid the draconian burdens of the Raisin Marketing Order simply by choosing to abandon or replace their raisin vineyards reflects a fundamental misunderstanding of their raisin-growing enterprises.

A raisin vineyard is a long-term investment; accordingly, the Growers have dedicated considerable amounts of time, money, and effort to their vineyards. For many Growers, their vineyards represent a much deeper personal investment as well. Passed down over generations, the vineyards

themselves and the skills the Growers developed while tending them comprise a livelihood that the Growers should not have to abandon in order to avoid uncompensated takings of the literal fruits of their labors.

Overall, the U.S. raisin industry consists of some 3,000 growers located within the central San Joaquin Valley near Fresno, California. *See* California Raisins, The California Raisin Industry, http://calraisins.org/about/the-raisin-industry/ (last visited Mar. 5, 2015). These growers cultivate approximately 200,000 acres and produce approximately 350,000 tons of raisins in total each year, *see id.*, which amounts to almost 100 percent of the raisins produced in the United States and about 40 percent of raisins produced globally, *see* William L. Peacock & Frederick H. Swanson, *The Future of California Raisins Is Drying on the Vine*, 59 Cal. Agric., no. 2, Apr.-June 2005, at 70, *available at* http://ucanr.edu/datastoreFiles/391-325.pdf. Over 90 percent of these raisins are of the "Thompson Seedless" variety, *see id.*, a variety subject to the Raisin Marketing Order, *see* 7 C.F.R. § 989.166.

The Growers' vineyards range from 15 to 240 acres. Notwithstanding this relatively small scale, the Growers bring significant skill and experience to their operations. On average, the thirty-three Growers who are *amici* here have spent over 30 years in the industry, and some more than 60. Most carry on raisin-growing businesses from prior generations. Five are third-generation raisin growers; three are fourth-generation raisin growers; one is a fifth-

generation grower; and two continue family businesses of over 100 years. *See* App. A at 2a-4a, 6a-7a, 9a-10a, 12a, 14a; *see also* L. Peter Christensen, *Background and Resource, in Raisin Production Manual* 7 (L. Peter Christensen ed., 2000) ("Originally, most raisin farms were family operations consisting of 20 to 40 acres These origins are reflected in the industry today, with many family-oriented, relatively small farms still in existence.").

The length of time the Growers and their families have been engaged in the raisin growing business reflects both the substantial outlays required to establish a vineyard and the intensive nature of the cultivation and harvest of raisins. A vineyard is a "long-term investment" because it typically takes at least three years before a vineyard will produce a commercial crop. Robert H. Beede & L. Peter Christensen, *Planting a Raisin Vineyard, in Raisin Production Manual* at 64. Even after the initial planting, raisin vineyards require careful management on an ongoing basis. Each year the Growers spend, on conservative estimates, an average of nearly $2,000 per acre to cultivate the grapes for their raisin crops. *See generally* App. A.[6]

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[6] *See also, e.g.*, University of California at Davis Cooperative Extension, *Sample Costs to Produce Grapes for Raisins* 16 (2006) (estimating costs at between $3,338 and $3,668 per acre), *available at* https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0CCgQFjAB&url=ht

Their determinations of how much to invest in the cultivation of a given year's raisin crop entails experience-informed consideration of weather- and harvest-related risks.

When the Growers' raisin crops are ready for harvesting in late August and early September, *see* L. Peter Christensen, *Raisin Grape Varieties*, *in Raisin Production Manual* at 38-39 (describing harvest of Thompson Seedless grapes), the Growers undertake significant additional efforts to collect and dry the raisins before sending them to handlers for packing. Although new harvesting methods may be emerging, "[t]he traditional method of hand-harvesting and drying grapes on trays for natural raisins has changed little over the past hundred years." Peacock & Swanson, 59 Cal. Agric., no. 2, at 70. "This process is labor intensive, requires close supervision and experienced management, and involves weather risks." *Id.* Indeed, California raisin harvesting "has traditionally been considered the most labor-intensive activity in North American agriculture." *California: Raisins, Parlier*, Rural Migration News, Apr. 2005, *available at* https://migration.ucdavis.edu/rmn/more.php?id=976_0_2_0.

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tp%3A%2F%2Fcoststudies.ucdavis.edu%2Ffiles%2Fgrraisctoldeqsjv06.pdf&ei=2q4yVKr9CNHlsAS-6oD4Dw&usg=AFQjCNEID0bMGruMQfQ9pXm0FHYHxxFUBQ&sig2=XN7jzTx20A3Pl9R_0Ozlrg&bvm=bv.76802529,d.cWc.

Raisin growers thus make substantial initial outlays and assume significant risks well before early October, when they first receive notice of the likely reserve tonnage requirement for the year's crops. *See* 7 C.F.R. § 989.54(b) (requiring announcement of preliminary free and reserve percentages by October 5 of each crop year, with a limited exception). By the time the RAC publishes the final "reserve tonnage" requirement in February, *see* 7 C.F.R. § 989.54(d), the Growers have not only dedicated considerable amounts of time, money, and effort to the production of their raisin crops, but also brought their experience to bear in careful crop management throughout the production process. Accordingly, the Growers reasonably expect to reap the full rewards of their investment and labor on the market.

When it is imposed, the "reserve tonnage" requirement decimates those expectations. In the two crop years at issue in Petitioners' case, 2002-2003 and 2003-2004, the reserve requirement took 47 percent and 30 percent of the Growers' total crops, respectively. *See* Pet. App. 179a-180a. Thus, the Growers essentially relinquished to the government one out of every two of the raisins they cultivated and harvested one year, and one out of every three raisins the next year. *See also id.* at 180a n.12 (citing 2005 reserve requirement of 17.5 percent).

As a result of the threat of a reserve requirement from year-to-year, the Growers have faced significant economic uncertainty and, ultimately, loss. *See* App. A at 1a (stating that even absent a reserve

requirement since 2010, "the cloud of complexity is still looming"); *id.* at 10a (explaining that the possibility of a reserve requirement "has made farming very unpredictable and unreliable."). Because of the wide-ranging differences in reserve requirements from year to year, "[p]roducers have great difficulty in projecting potential future revenue." Sun-Maid Petition at 6. In one Grower's words, these differences make "crop budgeting . . . impossible" and "[a]nticipating a profit, even when harvest costs are closely regulated, . virtually impossible." App. A at 13a. "This substantial uncertainty makes it harder for growers, particularly those with business operations that are smaller or not vertically integrated, to obtain credit financing to cover production expenses." Sun-Maid Petition at 6. Or, as another Grower explains, "banks don't like to deal with raisin farmers because of the lack of security" resulting from the Raisin Marketing Order. App. A at 1a.

The difficulties many of the Growers report in obtaining bank loans necessary to fund the cultivation of the next year's crops, *see generally* App. A, exacerbate the direct economic losses they already face from surrendering part of their crop under the Order. In general, the Raisin Marketing Order "drastically lowers . . . farm [and] family income," *id.* at 9a, makes it "difficult to make ends meet," *id.* at 2a, and denies the Growers the opportunity to "plan a future to improve [their] quality of life," *id.* at 4a. If the RAC were to impose reserve requirements in the coming years, one Grower would have to sell his vineyard and "could

not recommend to [his] kids or grandchildren to farm raisins." *Id.* at 7a.

The panel's thoughtless suggestion that the Growers could avoid this blow to their livelihoods simply by growing different crops does not reflect reality. Given the accretive personal and financial resources the Growers have devoted to their raisin crops over the years, abandoning those crops would be a significant sacrifice. Moreover, such a course of action would prove financially prohibitive for most Growers. In contrast to "row" crops such as corn or wheat, raisin vineyards are difficult and costly to uproot and replace. Many Growers estimate that it would cost hundreds of thousands of dollars to replace their entire raisin crops with alternative crops, not accounting for the amount of time they would have to wait before the new crops began to yield a return. *See generally* App. A. The panel's asserted "choice" is thus a highly costly one at both ends, and one that implicates deep personal attachments to an inherited way of life. Therefore, the panel could not reasonably have expected Petitioners or the Growers to relinquish that way of life, even if doing so would enable them to avoid the exceedingly onerous (and weakly justified) burden imposed by the Raisin Marketing Order.

As Justice Scalia observed during oral argument in a prior iteration of this case, the choice presented by the Raisin Marketing Order amounts to "your raisins or your life." Tr. of Oral Arg. at 31, *Horne v. U.S. Dep't of Agric.*, 133 S. Ct. 2053 (2013) (No. 12-123) (Scalia, J.). In view of the actual conditions the

Growers face under the Raisin Marketing Order, the panel's conclusion that Petitioners, and likewise the Growers, either receive some benefit or voluntarily accept the burdens of that Order simply by "choosing" to grow raisins cannot stand.

II. Contrary To The Panel's Decision, The Fifth Amendment Commands That The Growers Receive Just Compensation When The Government Takes Their Raisin Crops.

The permanent, physical segregation of a portion of Petitioners' and the Growers' raisin crops "for the account" of a government entity constitutes a *per se* taking for which Petitioners and Growers are constitutionally entitled to just compensation. This Court's precedent supports that conclusion, and other courts have accordingly embraced it. In contrast, the Ninth Circuit panel ultimately concluded that the reserve requirement did not effect a taking because "[a]t bottom" it was just "a use restriction applying to the Hornes insofar as they voluntarily choose to send their raisins into the stream of interstate commerce." Pet. App. 25a. But the choice to exercise one of the most fundamental property rights in the bundle protected by the Fifth Amendment—the right of alienation—cannot be conditioned upon the surrender of the right to just compensation.[7]

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[7] The right of alienation has long occupied a central place among the bundle of property rights the Fifth Amendment protects. *See, e.g., Hodel v. Irving*, 481 U.S.

The panel's erroneous "use restriction" holding rests on two bases, neither of which is defensible. First, the panel apparently believed that the Fifth Amendment's categorical protections apply only to real and not personal property, and therefore a taking of personal property was not a taking at all. Second, the panel found no problem with the taking because it reasoned that Petitioners actually benefitted from surrendering their personal property to the government without just compensation. This Court should reject both bases.

1. As Petitioners capably explain, the distinction drawn by the panel between real and personal property lacks support in the case law, *see* Pet'rs' Br. at 33-36, and the historical origins of the Fifth Amendment, *see id.* at 36-39. But the panel's distinction also makes no sense in the context of this case. The Growers unquestionably have title to their raisin crops as personal property under California law. *See* Cal. Rev. & Tax. Code § 6016 ("'Tangible personal property' means personal property which may be seen, weighed, measured, felt, or touched, or which is in any other manner perceptible to the senses."); Cal. Com. Code § 2105(1) (defining "[g]oods"); *see also Stop the Beach Renourishment,*

704, 716 (1987) ("[T]he right to pass on property has been part of the Anglo-American legal system since feudal times."); William Blackstone, 2 *Commentaries* *447 ("Where the vendor hath in himself the property of the goods sold, he hath the liberty of disposing of them to whomever he pleases, at any time, and in any manner.").

Inc. v. Florida Dep't of Envtl. Prot., 560 U.S. 702, 707 (2010) ("Generally speaking, state law defines property interests."). Pursuant to the Raisin Marketing Order, the Growers must transfer title to the RAC for a percentage of their raisins every year the RAC imposes a reserve requirement. A transfer of title from the Growers to the federal government unquestionably deprives the Growers of their property. Thus, characterizing the raisins as "personal property" does not make the taking of the raisins any less a taking.

Moreover, the panel's semantics notwithstanding, there is no practical difference between a "reserve tonnage" of the Growers' raisins and a reserve acreage of the Growers' vineyards.[8] If the Raisin Marketing Order specified a number of acres of land—that is, real property—that the Growers were required to cordon off from the acres from which they could sell raisins on the free market, then the panel

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[8] Likewise, there is little practical difference between demanding a certain percentage of growers' raisins and demanding a certain percentage of the proceeds from the sale of those raisins. *See Cerajeski v. Zoeller*, 735 F.3d 577, 580, 583 (7th Cir. 2013) (holding that the State's "confiscation" of interest in a bank account was a categorical taking, likening the State to a neighbor who takes the apples from one's apple orchard). On the continuum from land to the products of that land to the proceeds from the sale of those products, there is no basis for the exclusion of the products alone from the Fifth Amendment's categorical protection.

would have been forced to reach the opposite conclusion. In that case, there would be no plausible distinction whatsoever between the Raisin Marketing Order and the taking this Court found in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), where state law had required a landlord to permit cable installations on his rental property. Concluding that the cable installations were "a minor but permanent physical occupation of an owner's property," the Court held that they constituted a taking and therefore entitled the landlord to compensation. *See Loretto*, 458 U.S. at 421. No matter how small the reserve requirement, therefore, an order mandating that the Growers physically cordon off part of their acreage for the government's use would constitute no less of a "physical occupation" than the cable installation requirement in *Loretto*.

Equally analogous to the cable installation requirement in *Loretto*, the "reserve tonnage" requirement cuts through every strand in the traditional bundle of property rights—ownership, possession, use, and disposal—that the Growers hold in the reserve raisins. The Growers relinquish their title to, and physical possession of, the reserve raisins to the government, and they lose control over the use and disposal of the raisins from that point on. "[S]uch a physical occupation of property is," quite simply, "a taking." *Loretto*, 458 U.S. at 421. The fact that the Growers may receive some compensation for the reserve raisins, contingent on factors entirely beyond their control, in no way diminishes the taking that has occurred; it only

raises the question of whether the offered compensation is just.

2. The Ninth Circuit's conclusion that the Raisin Marketing Order is a valid "use regulation" rather than a "physical occupation" because of some purported benefit to the raisin growers is no more defensible. Pet. App. at 22a (finding that the reserve raisins' "disposition, while tightly controlled, inures to [Petitioners'] benefit"). This Court has never endorsed the argument that a nebulous (and here, utterly dubious) "benefit" can negate the fact that a taking has occurred or substitute for the just compensation required by the Fifth Amendment. Indeed, if that were the case, the scheme specifically proscribed in *Loretto*—the "requisition [of] a certain number of apartments" in a rental building "as permanent government offices," 458 U.S. at 439 n.17—would be permissible provided that the government's occupation constricted the rental market supply and thereby propped up rental prices to the benefit of the landlord. As the Court concluded in *Loretto*, however, "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation." *Id.* Accordingly, even though "*Loretto* specifically preserve[d] the state's 'substantial authority' and 'broad power to impose appropriate restrictions upon an owner's use of his property,'" Pet. App. 22a (quoting *Loretto*, 458 U.S. at 441), it did not do so at the expense of the Fifth Amendment.

This Court has made clear that there is no "blanket exception to the Takings Clause whenever

Congress exercises its Commerce Clause authority." *Kaiser Aetna v. United States*, 444 U.S. 164, 172 (1979). The Ninth Circuit panel's attempt to contort the Raisin Marketing Order into a mere "use restriction," or a condition on entry into interstate commerce, *see* Pet. App. at 25a, amounts to a rejection of that statement. *See Loretto*, 458 U.S. at 425 ("It is a separate question . . . whether an otherwise valid regulation so frustrates property rights that compensation must be paid."). In contrast, the Eleventh Circuit has appropriately recognized that "[c]haracterizing [a] mandatory access provision as a regulatory condition, even one allegedly designed to foster competition, cannot change the fact that it effects a taking by requiring a utility to submit to a permanent, physical occupation of its property." *Gulf Power Co. v. United States*, 187 F.3d 1324, 1331 (11th Cir. 1999) ("However laudatory its motive, Congress' power to regulate utilities does not extend to taking without just compensation the right of a utility to exclude unwanted occupiers of its property."). This Court should validate the Eleventh Circuit's reasoning and confirm that when the government takes title to, and physical possession of, property—whether real or personal, and regardless of the regulatory justification—a taking has occurred and just compensation must be paid.

III. If Affirmed, The Ninth Circuit's Decision Could Have Sweeping Ramifications With Debilitating Impacts On Agricultural And Other Small Producers.

Though unique in certain respects, the Raisin Marketing Order bears resemblance to many other agricultural orders with significant impacts in California. Should the Court affirm the panel's erroneous Takings Clause analysis, that analysis could infect regulation of other crops upon which the region is heavily—and proudly—dependent. The decision thus holds much greater significance than its immediate outcome for Petitioners and the Growers.

The Raisin Marketing Order imposes the most "draconian" burden of all the agricultural marketing orders now in effect. *Evans*, 74 Fed. Cl. at 555. Unlike the marketing orders for almonds, walnuts, tart cherries, prunes, and spearmint oil. for example, it "effects a direct transfer of title of a producer's 'reserve tonnage' raisins to the government, and it requires physical segregation of the reserve-tonnage raisins held for the government's account." *Id.* at 558 (citing 7 C.F.R. §§ 989.54, 989.65, 989.66(b)(2), (4)); *cf.* 7 C.F.R. § 981.52 (requiring almond handlers to "hold in [their] possession or under [their] control, in proper storage for the account of the Board, the quantity of almonds necessary to meet his reserve obligation"); *id.* §§ 993.54, 993.57 (imposing similar requirement on prune handlers); *Prune Bargaining Ass'n v. Butz*, 444 F. Supp. 785, 788-89 (N.D. Cal. 1975) ("These reserve prunes are not physically

segregated from the salable prunes, however, and thus the reserve is, in fact, a paper reserve."), *aff'd*, 571 F.3d 1132 (9th Cir. 1978).

Thus, holding that the reserve requirement under the Raisin Marketing Order effectuates an unconstitutional taking would not necessarily implicate other reserve programs. Nonetheless, the Raisin Marketing Order shares certain features with marketing orders for other agricultural products. *See Evans*, 74 Fed. Cl. at 555. The RAC is one of many industry committees with the power to sell or dispose of reserves held for the government's account. *See* 7 C.F.R. §§ 981.66(a) (almonds), 984.56(a) (walnuts), 993.65(a) (prunes). Additionally, like raisin producers, producers of almonds, walnuts, and prunes receive only pro rata shares of any net proceeds from the sale of their reserve crops. *See* 7 C.F.R. §§ 981.66(e) (almonds), 984.56(e) (walnuts), 993.65(e) (prunes).

The panel's decision affords no basis for distinguishing the marketing orders for other crops from the Raisin Marketing Order for purposes of its Takings Clause analysis. Therefore, it would require little effort for the Department of Agriculture to ratchet up the marketing restrictions for other crops to the most "draconian" level, *Evans*, 74 Fed. Cl. at 555, and take title to and physical possession of these other crops' reserves as well. And as Petitioners noted below, the panel's reasoning would extend beyond agricultural markets and allow the government to "require a manufacturer of microchips to turn over 50 percent of its manufactured goods for

government use, if the manufacturer sells those chips in interstate commerce." Petition for Panel Rehearing or Rehearing En Banc at 21, *Horne v. U.S. Dep't of Agric.*, 673 F.3d 1071 (9th Cir. 2012) (No. 10-15270), ECF No. 30-1. The potential scope of the panel's erroneous analysis underscores its errors.

CONCLUSION

As one of *amici* expresses, the Growers simply want independence and a "chance to live the American dream" free of the burdens imposed by the Raisin Marketing Order. App. A at 8a. For the foregoing reasons and those set forth in the brief of Petitioners, the Court should reverse the judgment of the Ninth Circuit.

Respectfully submitted,

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March 9, 2015

APPENDIX

APPENDIX A

INDEPENDENT RAISIN GROWERS[1]

1. Bryan Arabian operates a 150-acre raisin vineyard under the name Arabian Farms. He has been producing raisins for 16 years, and his family has been in the raisin growing business since 1949. From the time Mr. Arabian completes one year's raisin harvest to the time the next harvest begins, he spends approximately $2,200 per acre on cultural costs.[2] Mr. Arabian estimates the cost of removing his raisin vineyard acreage and planting another crop amenable to his soils would be $10,000 per acre. As a result of the Raisin Marketing Order, Mr. Arabian has lost 20 raisin acres in the last twenty-plus years. The possibility of a reserve requirement makes it "very difficult" for Mr. Arabian to obtain bank loans to finance his next crop season. Even in the absence of a reserve requirement since 2010, "the cloud of complexity is still looming," and "banks don't like to deal with raisin farmers because of the lack of security." Mr. Arabian believes that the "reserve is a scheme to help the handler" while "producers are left with little nothing to show for [their] hard labor and risk."

2. David Baer farms a 20-acre raisin vineyard. He has been producing raisins for over 30 years as a

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[1] Surveys of the raisin growers from which these excerpts are taken are on file with the authors of this brief.

[2] "Cultural costs" include the costs of pruning, fertilizing, and irrigating the crop, as well as the costs of weed, insect, and disease control.

third-generation raisin grower. From the time Mr. Baer completes one year's raisin harvest to the time the next harvest begins, he spends approximately $1,250 per acre on cultural costs. As a result of the Raisin Marketing Order, Mr. Baer has lost approximately 20 raisin acres in the last twenty-plus years. The possibility of a reserve requirement also makes it difficult for Mr. Baer to obtain bank loans to finance his next crop season. In general, the Raisin Marketing Order makes it "difficult to make ends meet."

3. Brent Bean operates a raisin vineyard under the name Bean & Sons. He is a fifth-generation raisin grower.

4. Jack Blehm farms a 60-acre raisin vineyard. He has been producing raisins for 43 years, and his family has been in the raisin growing business since 1942. From the time Mr. Blehm completes one year's raisin harvest to the time the next harvest begins, he spends approximately $3,800 to $4,200 per acre on cultural costs. Mr. Blehm conservatively estimates the cost of removing his raisin vineyard acreage and planting another crop amenable to his soils would be $12,000 to $18,000 per acre. Mr. Blehm works a second job to help pay the bills and compensate for the loss of income resulting from the Raisin Marketing Order. "Losing 30 percent to 50 percent of any business is devastating," he explains. In the absence of a reserve requirement since 2010, however, Mr. Blehm's circumstances have improved.

5. Roger Blehm farms a 60-acre raisin vineyard. He has been producing raisins for 9 years, and his

family has been in the raisin growing business since 1942. From the time Mr. Blehm completes one year's raisin harvest to the time the next harvest begins, he spends approximately $3,800 to $4,200 per acre on cultural costs. Mr. Blehm estimates the cost of removing his raisin vineyard acreage and planting another crop amenable to his soils would be $14,000 to $20,000 per acre. Mr. Blehm works a second job to help compensate for the loss of income resulting from the Raisin Marketing Order. In the absence of a reserve requirement since 2010, however, Mr. Blehm's circumstances have improved.

6. Michael J. Bopp operates a 160-acre vineyard under the name Mike Bopp Farms. He has been producing raisins since 1983 as a fourth-generation raisin grower. From the time Mr. Bopp completes one year's raisin harvest to the time the next harvest begins, he spends approximately $2,000 per acre on cultural costs. Mr. Bopp estimates the cost of removing his raisin vineyard acreage and planting another crop amenable to his soils would be $5,000 per acre. The possibility of a reserve requirement makes it difficult for Mr. Bopp to borrow off of his potential income. In the absence of a reserve requirement since 2010, however, Mr. Bopp's circumstances have improved. He has been able to update his ranch and improve production by changing from hand picking to mechanical harvesting.

7. Earl O. Boyajian farms a 98-acre raisin vineyard. He has been producing raisins for 55 years, and his family has been in the raisin growing

business for 92 years. From the time Mr. Boyajian completes one year's raisin harvest to the time the next harvest begins, he spends $1,500 to $2,000 per acre on cultural costs. Mr. Boyajian estimates the cost of removing his raisin vineyard acreage and planting another crop amenable to his soils would be $4,000 to $6,000 per acre. As a result of the Raisin Marketing Order, Mr. Boyajian has lost approximately 140 raisin acres in the last twenty-plus years. The possibility of a reserve requirement also makes it "very difficult" for Mr. Boyajian to obtain bank loans to finance his next crop season. Mr. Boyajian notes that under the Raisin Marketing Order, he "can never plan a future to improve [his] quality of life"—"[n]o truck, no equipment, no household improvements." He asks that the RAC "at least give" the growers "[their] cultural costs back."

8. Jack Cardwell farms a 34-acre raisin vineyard. He has been producing raisins for 10 years as a third-generation raisin grower. From the time Mr. Cardwell completes one year's raisin harvest to the time the next harvest begins, he spends approximately $900 per acre on cultural costs. Mr. Cardwell reports that no amount of money would enable him to remove raisin vineyard acreage and plant another crop amenable to his soils because he is 70 years old. As a result of the Raisin Marketing Order, Mr. Cardwell has lost approximately eight raisin acres in the last twenty-plus years. The possibility of a reserve requirement also makes it difficult for Mr. Cardwell to obtain bank loans to finance his next crop season. Mr. Cardwell must rely on social security and his wife's pay.

9. Arleen G. Daggs farms a 20-acre raisin vineyard. Her family has been in the raisin growing business since 1917. From the time Ms. Daggs completes one year's raisin harvest to the time the next harvest begins, she spends approximately $2,000 per acre on cultural costs. Ms. Daggs estimates the cost of removing her raisin vineyard acreage and planting another crop amenable to her soils would be a minimum of $25,000 per acre, not including the loss of income for three years. Ms. Daggs has lost approximately 40 raisin acres in the last twenty-plus years, due to two bankruptcies and a foreclosure. Ms. Daggs works a second job to help pay some of the expenses associated with the culture and harvest of the crops. She notes that "since 1964" she has always had to have a second job, whereas "[b]efore that the farm raised the family." Without a very large farming operation and significant diversification, she concludes, raisin farming has become only a hobby. In the absence of a reserve requirement since 2010, however, Ms. Daggs' circumstances have improved. She can now direct resources toward vine replacements, ground improvements, and efforts to save vines from pest destruction.

10. Harris Daggs farms a 77.5-acre raisin vineyard. He has been producing raisins for 51 years, and his family has been in the raisin growing business for 100 years. From the time Mr. Daggs completes one year's raisin harvest to the time the next harvest begins, he spends approximately $1,000 per acre on cultural costs. Mr. Daggs estimates the cost of removing his raisin vineyard acreage and

planting another crop amenable to his soils would be $175,000. As a result of the Raisin Marketing Order, Mr. Daggs has been forced to hold two jobs to support the farm.

11. David Flagler farms a 35-acre raisin vineyard. He has been producing raisins since 1983 as a fourth-generation raisin grower. From the time Mr. Flagler completes one year's raisin harvest to the time the next harvest begins, he spends approximately $1,250 per acre on cultural costs. Mr. Flagler estimates the cost of removing his raisin vineyard acreage would be $2,500 per acre. As a result of the Raisin Marketing Order, Mr. Flagler has lost 300 raisin acres in the last twenty-plus years. The possibility of a reserve requirement also makes it difficult for Mr. Flagler to obtain bank loans to finance his next crop season. In the absence of a reserve requirement since 2010, however, Mr. Flagler's circumstances have improved.

12. Walter George Flagler operates a 100-acre raisin vineyard under the name Flagler Farms. He has been producing raisins for 55 years as a second-generation raisin-grower. From the time Mr. Flagler completes one year's raisin harvest to the time the next harvest begins, he spends approximately $1,500 per acre on cultural costs. Mr. Flagler estimates the cost of removing his raisin vineyard acreage and planting another crop amenable to his soils would be $2,500 per acre. As a result of the Raisin Marketing Order, Mr. Flagler has lost 100 raisin acres in the last twenty-plus years. The possibility of a reserve requirement also makes it difficult for Mr. Flagler to

obtain bank loans to finance his next crop season. In the absence of a reserve requirement since 2010, however, Mr. Flagler's circumstances have improved.

13. Chris C. Gauss operates a 40-acre raisin vineyard under the name Gauss Ranches. He has been producing raisins for 38 years, and his family has been in the raisin growing business since 1907. From the time Mr. Gauss completes one year's raisin harvest to the time the next harvest begins, he spends approximately $1,500 per acre on cultural costs. Mr. Gauss estimates the cost of removing his raisin vineyard acreage and planting another crop amenable to his soils would be $6,000 per acre. The possibility of a reserve requirement makes it difficult for Mr. Gauss to obtain bank loans to finance his next crop season. Mr. Gauss's circumstances have improved in the absence of a reserve requirement since 2010. If the RAC were to impose reserve requirements in the coming years, however, Mr. Gauss would have to sell the vineyard and "could not recommend to [his] kids or grandchildren to farm raisins."

14. Harjinder S. Gill farms a 160-acre raisin vineyard. He has been producing raisins for 36 years as a first-generation immigrant. From the time Mr. Gill completes one year's raisin harvest to the time the next harvest begins, he spends approximately $1,500 per acre on cultural costs. Mr. Gill estimates the cost of removing his raisin vineyard acreage and planting another crop amenable to his soils would be $5,000 per acre. As a result of the Raisin Marketing Order, Mr. Gill has lost 20 raisin acres in the last

twenty-plus years. He has not been turned down for a bank loan because his operation is diversified, but he notes that he "do[es] not even get [his] cost of production back" for the reserve raisins.

15. Robert Z. Gonzalez operates a 50-acre raisin vineyard under the name Gonzalez Farms. He has been producing raisins since 1966. From the time Mr. Gonzalez completes one year's raisin harvest to the time the next harvest begins, he spends approximately $3,000 per acre on cultural costs. Mr. Gonzalez estimates the cost of removing just 20 acres of his raisin vineyard and planting another crop amenable to his soils would be $850,000. As a result of the Raisin Marketing Order, Mr. Gonzalez has lost 20 raisin acres in the last twenty-plus years. The possibility of a reserve requirement also makes it difficult for Mr. Gonzalez to obtain bank loans to finance his next crop season. Mr. Gonzalez expresses his desire for independence and "a chance to live the American dream."

16. Nick Goosev farms a 33-acre raisin vineyard. He has been producing raisins for 34 years, and his family has been in the raisin growing business for 60 years. From the time Mr. Goosev completes one year's raisin harvest to the time the next harvest begins, he spends approximately $1,000 per acre on cultural costs. Mr. Goosev estimates the cost of removing his raisin vineyard acreage and planting another crop amenable to his soils would be $30,000 to $50,000. The possibility of a reserve requirement makes it difficult for Mr. Goosev to obtain bank loans to finance his next crop season. Under the Raisin

Marketing Order, Mr. Goosev can "barely make it every year." Since 2010, however, his circumstances have improved. "It is nice to get 100 percent of your crop in income," he reports.

17. Brad Hansen operates a 240-acre raisin vineyard under the name Brad Hansen Farm. He has been producing raisins for 34 years as a fourth-generation farmer. From the time Mr. Hansen completes one year's raisin harvest to the time the next harvest begins, he spends approximately $2,200 per acre on cultural costs. Mr. Hansen estimates the cost of removing his raisin vineyard acreage and planting another crop amenable to his soils would be $6,000 per acre, and he notes that he would replace the raisin crop with almonds. The possibility of a reserve requirement makes it difficult for Mr. Hansen to obtain bank loans to finance his next crop season. In general, the reserve requirement "drastically lowers [his] farm/family income."

18. David Hernandez operates a 20-acre raisin vineyard under the name Mi Tierra Vineyard. He has been producing raisins for 13 years. From the time Mr. Hernandez completes one year's raisin harvest to the time the next harvest begins, he spends approximately $1,500 per acre on cultural costs. Mr. Hernandez estimates the cost of removing his raisin vineyard acreage and planting another crop amenable to his soils would be $80,000. The possibility of a reserve requirement makes it difficult for Mr. Hernandez to obtain bank loans to finance his next crop season. In general, the possibility of a

reserve requirement "has made farming very unpredictable and unreliable."

19. David Horne farms a 55-acre raisin vineyard. He has been producing raisins since 1976 and has worked on raisin vineyards since childhood. From the time Mr. Horne completes one year's raisin harvest to the time the next harvest begins, he spends approximately $1,500 per acre on cultural costs. Mr. Horne estimates the cost of removing his raisin vineyard acreage and planting another crop amenable to his soils would be $10,000 per acre. The possibility of a reserve requirement makes it difficult for Mr. Horne to obtain bank loans to finance his next crop season. In general, the possibility of a reserve requirement "makes everything so uncertain and worrisome." To compensate for the loss of income resulting from the Raisin Marketing Order, Mr. Horne worked a full-time job off the farm for many years. In the absence of a reserve requirement since 2010, however, Mr. Horne's circumstances have improved. "[Y]ear by year," things have been "getting better" and more "predictable."

20. Mike and Cheryl Jerkovich operated a 60-acre raisin vineyard under the name M-C Farms Inc. until they sold it on July 1, 2014. They had been producing raisins since 1960 as third-generation raisin growers. From the time the Jerkoviches completed one year's raisin harvest to the time the next harvest began, they spent approximately $2,000 to $3,000 per acre on cultural costs. The Jerkoviches estimate the cost of removing their raisin vineyard acreage and planting another crop amenable to their

soils would have been $10,000 per acre. The possibility of a reserve requirement made it difficult for them to obtain bank loans to finance their next crop season. As a result of the Raisin Marketing Order, the Jerkoviches lost 120 raisin acres in 2002 and ultimately had to sell the farm where Mike Jerkovich was raised.

21. Loren T. Linscheid operates a 40-acre raisin vineyard under the name Linscheid Organic Farms. He has been producing raisins since 1992, and his family has been in the raisin growing business for 60 years. From the time Mr. Linscheid completes one year's raisin harvest to the time the next harvest begins, he spends approximately $2,200 per acre on cultural costs. Mr. Linscheid estimates the cost of removing his raisin vineyard acreage and planting another crop amenable to his soils would be $10,000 per acre. As a result of the Raisin Marketing Order, Mr. Linscheid has lost approximately 40 raisin acres in the last twenty-plus years. The possibility of a reserve requirement also makes it difficult for Mr. Linscheid to obtain bank loans to finance his next crop season; in his experience, "no banks will look at a raisin farmer," and he has been turned down for loans "many times" in the past. He believes that "no one would go into [the] raisin business today with th[ese] . cultural costs and [this] economic climate."

22. Cheryl Miller farms a 40-acre raisin vineyard. She has been producing raisins for 20 years, and her family has been in the raisin growing business since 1917. From the time Ms. Miller

completes one year's raisin harvest to the time the next harvest begins, she spends approximately $2,000 per acre on cultural costs. In the absence of a reserve requirement since 2010, Ms. Miller's circumstances have improved.

23. Theresa and Thomas Ochoa operate a 30-acre raisin vineyard under the name Ochoa Farms. They have been producing raisins for 11 years as third-generation raisin growers. From the time the Ochoas complete one year's raisin harvest to the time the next harvest begins, they spend approximately $1,500 per acre on cultural costs. The Ochoas estimate the cost of removing their raisin vineyard acreage and planting another crop amenable to their soils would be $5,000 per acre. As a result of the Raisin Marketing Order, the Ochoas have suffered a loss of production because they were unable to afford necessary fertilizers. In the absence of a reserve requirement since 2010, however, their circumstances have improved. For example, they were able to pay their farming expenses without taking out a personal loan.

24. Gregory I. Patterson and Donna L. Patterson operate an 80-acre raisin vineyard under the name Abba's Acres. They have been producing raisins for 43 years, and their family has been in the raisin growing business for 103 years. From the time the Pattersons complete one year's raisin harvest to the time the next harvest begins, they spend approximately $220 per acre on cultural costs. The Pattersons estimate the cost of removing their raisin vineyard acreage would be $1,200 per acre. As a

result of the Raisin Marketing Order, the Pattersons have had to rent out 80 raisin acres in the last twenty-plus years. The possibility of a reserve requirement also makes it difficult for the Pattersons to obtain bank loans to finance their next crop season, and they have twice faced foreclosure. Furthermore, the possibility of a reserve requirement makes "crop budgeting . . . impossible" and "[a]nticipating a profit, even when harvest costs are closely regulated, . . . virtually impossible." In the absence of a reserve requirement since 2010, however, the Pattersons' circumstances have improved.

25. Tom Pavich and Frances Pavich operate an 80-acre raisin vineyard under the name FMP Vineyards. They have been producing raisins for 25 years as second-generation raisin growers, and their family has been in the business for 61 years. From the time the Paviches complete one year's raisin harvest to the time the next harvest begins, they spend approximately $2,500 per acre on cultural costs. The Paviches estimate the cost of removing their raisin vineyard acreage and planting another crop amenable to their soils would be $800,000. As a result of the Raisin Marketing Order, the Paviches have lost hundreds of raisin acres in the last twenty-plus years. The possibility of a reserve requirement also makes it difficult for the Paviches to obtain bank loans to finance their next crop season, and they have been turned down for loans in the past. In an effort to sell all of the organic raisins they grow, the Paviches have been "forced to buy conventional

raisins to substitute for [their] organic raisins on years there was a reserve."

26. John Radovich operates a 15-acre raisin vineyard under the name Radovich Farms. He has been producing raisins for 24 years, and his family has been in the raisin growing business for over 50 years. From the time Mr. Radovich completes one year's raisin harvest to the time the next harvest begins, he spends approximately $5,000 to $8,000 per acre on cultural costs. Mr. Radovich estimates the cost of removing his raisin vineyard acreage and planting another crop amenable to his soils would be $20,000, noting that he would have to wait until the new crop produces to reap any returns. The possibility of a reserve requirement also makes it difficult for Mr. Radovich to obtain bank loans to finance his next crop season. For many years under the Raisin Marketing Order, Mr. Radovich did not receive any payment for his reserve raisins, making it difficult to cultivate the following year's crop. In the absence of a reserve requirement since 2010, however, Mr. Radovich's circumstances have improved—there is "more money coming in." Yet if the RAC were to impose a reserve requirement in the coming years, it would be "impossible to keep [his] farm."

27. Leland Rebensdorf farms a 200-acre raisin vineyard. He has been producing raisins for 26 years as a third-generation raisin grower, whose family has been in the business for 93 years. From the time Mr. Rebensdorf completes one year's raisin harvest to the time the next harvest begins, he spends

approximately $2,660 per acre on cultural costs. Mr. Rebensdorf estimates the cost of removing his raisin vineyard acreage and planting another crop amenable to his soils would be $3,925 per acre. The possibility of a reserve requirement makes it difficult for Mr. Rebensdorf to obtain bank loans to finance his next crop season. As a result of the Raisin Marketing Order, Mr. Rebensdorf has "been constantly struggling to pay back crop-line debts," and "those debts keep increasing." In the absence of a reserve requirement since 2010, however, Mr. Rebensdorf's circumstances are "somewhat better."

28. Marvin Schafer operates a 152-acre raisin vineyard under the name MP Schafer Farms. He has been producing raisins for 55 years, and his family has been in the raisin growing business since 1938. From the time Mr. Schafer completes one year's raisin harvest to the time the next harvest begins, he spends approximately $2,500 per acre on cultural costs. Mr. Schafer estimates the cost of removing his raisin vineyard acreage and planting another crop amenable to his soils would be $10,000 per acre. As a result of the Raisin Marketing Order, Mr. Schafer has lost 50 raisin acres in the last twenty-plus years. Mr. Schafer notes that he served fifteen years on the RAC as an independent grower, but that he was unable to influence the board's direction, as "one vote against the packers did [not] change anything."

29. Walter A. Shubin operates a 20-acre raisin vineyard under the name Shubin Farms. He has been producing raisins for 65 years. From the time

Mr. Shubin completes one year's raisin harvest to the time the next harvest begins, he spends approximately $3,500 per acre on cultural costs. As a result of the Raisin Marketing Order, Mr. Shubin has lost approximately 180 raisin acres in the last twenty-plus years. The possibility of a reserve requirement also makes it difficult for Mr. Shubin to obtain bank loans to finance his next crop season, putting him into bankruptcy for seven years. Mr. Shubin and his wife have secured second jobs in order to keep their land and their home. In Mr. Shubin's view, the Raisin Marketing Order "destroyed" him.

30. Oleth Wayne Snell farms a 30-acre raisin vineyard. He has been producing raisins for 43 years as a second-generation raisin grower. From the time Mr. Snell completes one year's raisin harvest to the time the next harvest begins, he spends more than $1,500 per acre on cultural costs. Mr. Snell estimates the cost of removing his raisin vineyard acreage and planting another crop amenable to his soils would be $2,500. As a result of the Raisin Marketing Order, Mr. Snell has lost five raisin acres in the last twenty-plus years. The possibility of a reserve requirement also makes it difficult for Mr. Snell to obtain bank loans to finance his next crop season. As a result of the Raisin Marketing Order, Mr. Snell is "unable to sustain improvements." In the absence of a reserve requirement since 2010, however, Mr. Snell's circumstances have improved.

31. Tim Turner farmed 20 acres of raisin vineyard until eight years ago. His family had been

in the raisin growing business since 1958. As a result of the Raisin Marketing Order, Mr. Turner lost all 20 acres of his raisin vineyard. He replaced his raisin crops with almonds, for which he is never required to turn over "47 percent of [his] crop."

32. Peter Wolf operates a 205-acre raisin vineyard under the name Wolf Pack Organic. He has been producing raisins for 60 years, and his family has been in the raisin growing business for over 100 years. From the time Mr. Wolf completes one year's raisin harvest to the time the next harvest begins, he spends approximately $750 per acre on cultural costs. In the absence of a reserve requirement since 2010, Mr. Wolf's circumstances are "much" improved.

33. Steve J. Zupanovich farmed a 20-acre raisin vineyard. He had been producing raisins for 31 years as a second-generation raisin grower. Mr. Zupanovich estimates the cost of removing his raisin vineyard acreage and planting another crop amenable to his soils was over $15,000 per acre. The possibility of a reserve requirement made it difficult for Mr. Zupanovich to obtain bank loans to finance his next crop season. As a result of the Raisin Marketing Order, Mr. Zupanovich pulled out his 20-acre vineyard "to stop losing money and profits." He now farms almonds instead, but remarks that "[i]t is so sad," as he "loved the raisin farming industry."

No. 14-275

SUPREME COURT, U.S.
FILED
MAR 9 - 2015
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MARVIN D. HORNE, *et al.*,

Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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258429

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INTEREST OF AMICUS

The Federal Circuit Bar Association ("FCBA") is a national bar association with more than 2600 members from all geographical areas of the country, all of whom practice before or have an interest in the decisions of the Court of Appeals for the Federal Circuit, and in decisions from this Court and other courts that address issues within the Federal Circuit's subject matter jurisdiction. The FCBA provides a forum for common concerns and dialogue between the bar and judges of the Federal Circuit. One of the FCBA's purposes is to offer assistance and advice to the federal courts, including briefs *amicus curiae*, on matters affecting practice before the Federal Circuit and other tribunals that address comparable subject matter.[1]

A great many FCBA members practice takings law, which falls within the Federal Circuit's jurisdiction. The FCBA and its members therefore have a keen interest in the proper application of the Fifth Amendment Takings Clause, and in this case, which presents important takings issues. The FCBA and its members are particularly

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1. All parties to this matter have granted blanket consent for amicus curiae briefs in support of either or neither party. The plaintiffs-appellants below, petitioners here, filed such consent on February 24, 2015. Defendant-appellee below, respondent here, the United States Department of Agriculture, filed such consent on February 27, 2015. The requirements of Rule 37.2(a) of the rules of this Court are satisfied by these filings.

Pursuant to Supreme Court Rule 37.6, the FCBA states that no counsel for a party authored this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members, or its counsel, made any monetary contribution to the preparation or submission of this brief.

concerned by the Ninth Circuit's holding that would entirely deny important Takings Clause protections to personal property—potentially including patents and contracts, which regularly come before the Federal Circuit and in which FCBA members and their clients have great interest.

INTRODUCTION

The Ninth Circuit held in this case that a federal regulatory requirement that petitioners (collectively "Horne") deliver a substantial portion of their annual raisin crop to a federal administrative body did not constitute a compensable taking. Of the several reasons the Ninth Circuit offered for that conclusion, one was particularly fundamental: that "the Takings Clause affords less protection to personal than to real property." Pet. App. at 18a. Relying on that distinction, the Ninth Circuit concluded that the requirement that the Hornes deliver their raisins to the administrative body did not fall within the scope of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), which held that permanent physical invasions of property work a *per se*, or "categorical" taking. *Id.* at 17a-20a. In other words, the Ninth Circuit would limit that *per se* rule to real property. *Id.*

The FCBA focuses this brief on the real/personal property distinction drawn by the Ninth Circuit. That distinction is contrary to this Court's longstanding reluctance to draw bright lines in takings cases, and has unsettling implications for takings jurisprudence that extend well beyond the circumstances of this case.[2]

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2. The other two questions presented for review in this case implicate issues of administrative law and policy that are not

SUMMARY OF ARGUMENT

The bright line the Ninth Circuit drew between real and personal property has no basis in the language of the Takings Clause, which protects "property" generally, and no place in this Court's takings jurisprudence. The Court has frequently cautioned against drawing bright line rules in takings cases, except in two circumstances: the *Loretto* situation, where governmental conduct leads to a physical intrusion on private property, and the situation presented in *Lucas v. South Carolina Coastal Council*, 505 U.S.1003 (1992), which held that regulation that eliminates all economically viable use of property also constitutes a *per se* taking. There is no reason in principle to limit either of these "categorical" rules to real property, and good reasons—including this Court's caution against bright lines in takings cases—not to subdivide the *Loretto* or *Lucas* rules by categorically excluding personal property from their purview.

Erecting a categorical distinction between real and personal property is particularly untenable, and unwise, because much property does not fall neatly into either category. Intangible property in particular—including patents and contracts, in which the Federal Circuit and the FCBA have a special interest—bears little resemblance to either real estate or raisins. Yet this Court has long held that both patents and federal contract rights are "property" protected by the Takings Clause, and there

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squarely within the Federal Circuit's jurisdiction. In addition, the FCBA believes that reversal on the real/personal property issue should largely decide this case because this Court's precedents involving real property provide firm guidance toward resolution of the other two questions presented.

has never been any question that federal appropriation of either patent rights or federal contracts rights works a taking. *See James v. Campbell*, 104 U.S. 356 (1881) (patents); *Lynch v. United States*, 292 U.S. 571 (1934) (contracts). There should likewise be no question that the full protection of the Takings Clause, including the categorical rules this Court upheld in *Loretto* and *Lucas* and other core principles of takings jurisprudence, extends to all forms of the "property" addressed in that Clause, whether real or personal, tangible or intangible.

ARGUMENT

I. The Ninth Circuit's Bright Line Distinction Between Personal And Real Property Is Contrary To The Takings Clause And To This Court's Takings Jurisprudence.

As the Hornes demonstrate, *see* Brief for Petitioners ("Pet. Br.") at 31-39, personalty has been recognized as among the "property" protected by the Takings Clause since the founding of the Republic, and indeed the uncompensated requisitioning of food and other supplies by military authorities back then was likely an important reason why the Clause was adopted. Not only is there a lack of any textual or historical basis for the distinction between real and personal property drawn by the Ninth Circuit, but with two substantial exceptions this Court has avoided drawing bright line rules in regulatory takings cases, instructing instead that such cases generally require "ad hoc, factual inquiries." *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 337 (2002) ("In

rejecting petitioners' *per se* rule [based on] the temporary nature of a land-use restriction, . . . we simply recognize that it should not be given exclusive significance one way or the other."); *Palazzolo v. Rhode Island*, 533 U.S. 606, 635 (2001) (O'Connor, J., concurring) ("The temptation to adopt what amount to *per se* rules in either direction must be resisted.").

To be sure, the Court laid down bright lines in both *Loretto* and *Lucas*. But those rules reflect the nature of the impact of regulation on property, not the nature of the property impacted. *See Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 540 (2005) ("[E]ach of these tests focuses directly upon the severity of the burden that government imposes upon private property rights."). There is no reason in principle why the bright line rules of *Loretto* and *Lucas* should be limited to real property. And there are good reasons not to subdivide the *Loretto* or *Lucas* rules by limiting them categorically to real property. Endorsing a new bright line, real/personal property distinction here would invite categorical application of that bright line rule to limit other takings principles to only real property cases or only personal property cases, contrary to this Court's recognition that what determines the scope of Takings Clause protection is the impact of regulatory action on property and not the type of the property impacted.

Loretto reaffirmed the rule, long-recognized in this Court's previous cases, that a taking unquestionably occurs—"*per se*"—when government action directly appropriates or causes a physical invasion property. As the Court explained in *Loretto*, "[p]roperty rights in a physical thing have been described as the rights 'to possess, use and dispose of it.' . . . To the extent that the

government permanently occupies physical property, it effectively destroys *each* of those rights." 458 U.S. at 435. Because such physical takings are recognized to be "perhaps the most serious form of invasion of an owner's property interests," *id.* at 435, *Loretto*'s categorical rule applies "however minor" the physical invasion. *Lingle*, 544 U.S. at 538.

Nothing in the rationale the Court expressed for the *per se* rule in *Loretto* supports, or even suggests, excluding personal property from its reach. The physical appropriation the government demands in this case destroyed the Horne's rights to possess, use and dispose of their raisins no less than the cable box on the rooftop of Loretto's apartment building invaded her right to exclusive use and enjoyment of her property. In fact, the physical confiscation of property required by the regulatory scheme in this case is an even more direct physical invasion by the government than in *Loretto*. There, unlike here, the New York statute left the property owners in possession of their buildings and only required them to allow other private parties (the cable companies)—not the government itself—to invade their property.

The Court in *Loretto* explicitly recognized that the very purpose of a *per se* rule is to apply across the board. It observed that the "traditional rule" that a physical invasion by the government is a *per se* taking "avoids otherwise difficult line-drawing problems." 458 U.S. at 436. The example the Court gave involved the nature of the impact on the property the government invaded, not the nature of the property invaded. The Court explained that application of the rule that physical invasion is a *per se* taking avoids judgments based on how much (or little)

space the government is occupying. In the present case, the government has confiscated the Horne's raisins in their entirety. It would be entirely inconsistent with *Loretto* to approve a bright line excluding personal property from the *per se* rule that such an invasion is a taking. In sum, there is no reason and no basis and no precedent for limiting the *Loretto* rule to real property, and the Ninth Circuit was wrong to do so. *See id.* at 434 ("[O]ur cases have uniformly found a taking to the extent of the occupation.").

Lucas focused on a different *per se* rule, which applies when government regulation denies "*all* economically beneficial uses" of property, *Lucas*, 505 U.S. at 1019, but the underlying rational for that rule is the same: "that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." *Id.* at 1018. *See Lingle*, 544 U.S. at 540 (Noting the "common touchstone" that underlies *Loretto* and *Lucas*; "[e]ach aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain.").

As with the *Loretto per se* rule, nothing in that rationale —which the Court offered in *Lucas* and reiterated in *Lingle*—warrants excluding personal property from the reach of the *Lucas* rule. Government action can eliminate "all economically beneficial or productive use" of personal property no less than of real property. If it does, then just as in the case of real property, the "total deprivation" is, from the property owner's perspective, "the equivalent of a physical appropriation." *See Lucas*, 505 U.S. at 1018. In fact, in a *dictum* addressing facts not present in *Lucas*, the Court acknowledged this very possibility: "[i]n the case of

personal property, by reason of the State's traditionally high degree of control over commercial dealings, [the property owner] ought to be aware of the possibility that new regulation might even render his property economically worthless." *Id.* at 1027-28. The Court then proceeded to address the real property that was involved in *Lucas*, rejecting the State's contention that "title is somehow held subject to the 'implied limitation' that the State may subsequently eliminate all economically viable use." *Id.* at 1028.

Citing these two passages, the Ninth Circuit asserted that "*Lucas* uses comparative language to make clear the Takings Clause affords more protection to real than to personal property." Even if that were true, it would provide no basis for concluding that the *per se* rule of *Lucas* rule is categorically inapplicable to personal property. In the present case the Ninth Circuit does not explicitly go that far, concluding only that its reading of *Lucas* supports its refusal to apply *Loretto's per se* rule to personal property. Pet. App. at 20a ("Given the Court's later discussion of personal property in *Lucas*, we see no reason to extend *Loretto* to govern controversies involving personal property."). Still, the Ninth Circuit's troublingly clear implication is that the "comparative" language it cited from *Lucas* may require a finding that personal property as a category is not protected by the *per se* rule of either *Loretto* or *Lucas*.

The Ninth Circuit misconstrues the passages it cited from *Lucas*. What this Court was discussing there was not any difference in the nature of real versus personal property that would result in different consequences when regulation eliminates all economic value of each

type of property. Instead, the Court in *Lucas* was addressing an important principle concerning the nature and consequences of regulatory impacts on property. Specifically, the Court was exploring the significance in a takings case of "limitations that inhere in the title [to property] itself," arising from "restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id.* at 1029. As the Court explained, "to win its case South Carolina . . . . must identify background principles of nuisance and property law that prohibit the uses [Lucas] now intends in the circumstances in which the property is presently found." *Id.* at 1031.

Nothing in *Lucas* supports the conclusion that this "nuisance exception" to takings liability, as some have called it, should not apply equally to personal property. Instead, the "comparative language" the Ninth Circuit cited from this Court's *Lucas* opinion was simply a recognition that different "background principles of nuisance and property law" may be relevant to real and personal property, owing to "the State's traditionally high degree of control over commercial dealings." 505 U.S. at 1027. Of course, federal and state land use authorities also exercise a high degree of control over development and other uses of real property. Therefore, differences between how background principles of property law may affect the impact of regulation on real versus personal property need to be explored case by case, not by entirely excluding personal property—because of its nature—from the reach of *Lucas*'s *per se* rule. *See Palazzolo*, 533 U.S. at 626-30 (Explaining that the mere existence of a regulatory scheme that might eventually limit or even deny productive use of property does not *per se* negate Takings Clause

protection for that property). Here again, there is no reason and no basis and no precedent for limiting the *Lucas* rule to real property, and even though the Ninth Circuit did not go that far in this case, the Court should make that clear.

II. This Court's Decisions Conferring Takings Clause Protection On Intangible Property Like Patents And Contracts Confirms That Different Types Of Property Should Not Be Treated Differently In Takings Cases.

In addition to being unfounded, the distinction the Ninth Circuit drew between real and personal property is entirely unhelpful in assessing the consequences of governmental impacts on private property, which is the touchstone of takings liability. That is particularly so in the realm of intangible property, and is another good reason to reject the real/personal property distinction.

Intangible property, like the patents and contracts that frequently come before the Federal Circuit, is oftentimes classified as personal property. But intangible property is typically impacted by government conduct in ways that differ from impacts on tangible personal property. To put it starkly, the government cannot physically invade a patent or a contract. Yet this Court has squarely held that both patents and contracts, as well as other types of intangible property, are fully protected by the Takings Clause from confiscation or elimination of their value by the government.

Those decisions further confirm that it is the impact of government conduct on property, and not the nature

or form of the property, that controls the application of Takings Clause principles. This includes the application to intangible property of what amount to *per se* rules when such property is appropriated or rendered valueless. Because many of the Court's intangible property takings cases predated *Loretto* and *Lucas*, they do not apply the "*per se*" label popularized by those decisions. But this Court's relevant precedents involve *per se* takings nonetheless, not because of the nature of the intangible property involved, but because of the same destructive impact of government conduct on property that was present in *Loretto* and *Lucas*.

As long ago as *James*, 104 U.S. 356 , the Court stated that it had "no doubt" that patents enjoyed the same constitutional protection as real property. The Court explained that a patent "cannot be appropriated or used by the government itself, without just compensation any more than it can appropriate or use without compensation land which has been patented to a private purchaser." *Id.* at 358. Reflecting the distinctive nature of patents (as well as other forms of intangible property), appropriation in this context does not necessarily mean that the government acquires title to a patent, but also includes the government's use of a patented invention. That is because a patent holder's property rights include the right to *exclusive* use of the invention. *See* U.S. CONST., art. I, § 8, cl. 8; *see* 35 U.S.C. § 271. When the government uses a patent without a license it destroys that exclusive right, and becomes liable to pay compensation. That is so clear and well-settled that the government long ago enacted a statute requiring compensation to patent holders whenever the government without a license uses or authorizes a contractor to use a patent. 28 U.S.C. § 1498;

see Richmond Screw Anchor Co., Inc. v. United States, 275 U.S. 331 (1928). As the Court instructed in *James*, the government thus recognizes that its unauthorized use of a patent *per se* requires compensation.[3]

This Court recognized a *per se* taking of trade secrets, another form of intangible property, in *Ruckelshaus v. Monsanto Company*, 467 U.S. 986(1984). There the Court held that EPA's use or disclosure to others of certain trade secret data was a taking, explaining that "[w]ith respect to a trade secret, the right to exclude others is central to the very definition of the property interest. Once the data that constitute the trade secret are disclosed to others, or others are allowed to use those data, the holder of the trade secret has lost his property interest in the data." *Id.* at 1011. Another example of a *per se* taking of intangible property rights, although again without benefit of that later-coined label, is *Armstrong v. United States*, 364 U.S. 40 (1960). There the Court found a taking of materialman's liens when the underlying property was transferred to the government, thereby erecting a sovereign immunity bar to enforcement of the liens. As the Court recognized, "[t]he total destruction by the Government of all value of these liens, which constitute compensable property, has every possible element of a Fifth Amendment 'taking.'" *Id.* at 48. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*,

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3. The Federal Circuit's predecessor, the Court of Claims, likewise recognized long ago that the government's unauthorized use of a patent constitutes a taking. *Pitcairn v. United States*, 212 Ct. Cl. 168, 180 (1976) ("The use or manufacture by or for the Government of a device or machine embodying any invention protected by a United States patent, is a taking of property by the Government under its power of eminent domain. The nature of the property thus taken is a license in the patent.).

449 U.S. 155, 164 (1980) (Addressing a taking of money, another form of intangible property: "a State, by *ipse dixit*, may not transform private property into public property without compensation.").

Turning finally to contract rights, yet another species of intangible property, the Court held in *Lynch*, 292 U.S. 571, that "[r]ights against the United States arising out of a contract with it are protected by the Fifth Amendment." *Id.* at 578. Although that case was remanded, the Court left no doubt that for Congress "[t]o abrogate contracts, in the attempt to lessen government expenditure, would not be the practice of economy, but an act of repudiation." *Id.* at 581. *See Perry v. United States*, 294 U.S. 330, 350-51 (1935). The Court more recently has avoided confronting the constitutional consequences of an outright government repudiation of one of its contracts by making clear that contract damages, the traditional "default remedy" for breach, is available when the government dishonors one of its contracts, even by a change in law. *United States v. Winstar Corp.*, 518 U.S. 839, 885 (1996). Still, *Lynch*'s recognition that rights under government contracts are constitutionally-protected property makes clear that an outright repudiation should be viewed as no less destructive of those rights—and thus no less a *per se* taking -- than a physical invasion or the elimination of all value of tangible property, whether real or personal.

* * * *

Were the Ninth Circuit's bright line distinction between real and personal property to be accepted, it would have unsettling implications not only for the scope of protection provided by the *per se* rules of *Loretto* and *Lucas*, but also

for the application of the principles embodied in those *per se* rules to intangible property like patents and contracts, and other forms of "property" that may defy ready categorization. *See, e.g., Yancey v. United States*, 915 F.2d 1534 (Fed. Cir. 1991) (Finding a taking of Yanceys' healthy turkey flock because a quarantine imposed by the government "prevented the interstate sale of their [live]stock and thereby destroyed its economic value"). This Court's decisions show that there is no basis and no reason for any bright line rule between real and personal property, or between other property types, whether tangible or intangible. If distinctions are to be drawn in takings cases, they should be based on the nature of the governmental impact on property, not the nature of the property impacted.

CONCLUSION

The Court should make clear that the rule of *Lorreto* applies in this case and reverse the court of appeals.

Respectfully submitted,

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March 9, 2015

No. 14-275

Supreme Court, U.S.
FILED
MAR 9 - 2015
OFFICE OF THE CLERK

In The Supreme Court of the United States

MARVIN D. HORNE, et al.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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INTEREST OF *AMICUS CURIAE*

The undersigned *amicus curiae* files this brief in support of the Petitioners.[1]

The Institute for Justice is a nonprofit, public-interest law center committed to defending the essential foundations of a free society through securing greater protection for individual liberty and restoring constitutional limits on the power of Government. Central to the mission of the Institute is strengthening the ability of individuals to control and transfer property and demonstrating that property rights are inextricably connected to other civil rights. The Institute also believes that constitutional review always requires consideration of current realities. When the factual premises for a law no longer exist due to the passage of time, a law can become unconstitutional, even if it may have been constitutional under the factual circumstances of the world when passed long ago. The Institute is therefore interested in this case because it presents an unusual scenario: An attempt by the Government to confiscate property based on a

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[1] Counsel for the *amicus curiae* authored this brief alone and no other person or entity other than the *amicus curiae*, its members or counsel have made a monetary contribution to the preparation or submission of this brief. The parties have jointly given their consent to the filing of *amicus curiae* briefs and have filed their letters of consent with the Court. Counsel for the *amicus curiae* timely notified counsel for the parties that we intended to file this brief.

regulatory scheme whose factual premises are decades out of date.

SUMMARY OF ARGUMENT

When this case was here in 2013, Justice Kagan commented at oral argument that the statute at the heart of the case may be "the world's most outdated law." And so it is.

This is more than an idle observation. In every area of constitutional law, this Court routinely demands that laws be evaluated in light of facts as they exist today. And where the facts that originally justified a law cease to exist, this Court strikes that law down. To be constitutional, a law must have more behind it than the Government's disinclination to update its rules in order to match reality.

This basic premise of constitutional law – the idea that a law enforced today must be relevant today – is central to this case. The statute underlying the raisin marketing order here is a vestige of the laws enacted during the first 100 days of President Roosevelt's New Deal. It was enacted to deal with a perceived economic crisis in agriculture by achieving what the law called "parity" prices, which it defined as the equivalent of market prices as they existed between 1910 and 1914. The order including raisins under this statute was first adopted at the end of World War II when the country faced a glut of raisins on the market that threatened to collapse the raisin

industry. By any reasonable understanding of reality, though, any such crisis has long passed.

This matters here because this case must be understood in light of the basic Takings Clause principle that the Government may not place conditions on the use of property that are unrelated to any burdens the proposed use would place on the public. And here, there is no credible suggestion that what the Hornes want to do (sell their raisins) would impose any burdens at all. There is no agricultural crisis, and no collapsing raisin industry to be protected. The only problem with allowing the Petitioners here to sell their raisins is that it conflicts with the Government's failure to update its agricultural rules in light of changed circumstances.

Simply put, the Government may well have the authority to keep its raisin regulations unchanged and to try to maintain a pre-World War I agricultural market. But it cannot maintain such an obsolete law without paying for the property confiscations this irrational policy requires, and it cannot insist that the costs of its intransigence be born entirely by the property owners in this case. The judgment of the court of appeals should therefore be reversed.

ARGUMENT

I. IT IS WELL SETTLED THAT A LAW MAY BECOME UNCONSTITUTIONAL OVER TIME IF ITS FACTUAL PREMISES CEASE TO EXIST.

This Court has long recognized that a challenged law – even if constitutional when enacted long ago – can become unconstitutional in application now if the passage of time has deprived the statute of its factual premises. This is common sense. The Constitution protects our rights in the real world today, and the Government must be able to justify its enforcement of a statute or regulation in light of the circumstances of the world as they are today. Thus, the constitutionality of a law always depends in part on whether its factual premises still exist, and this question has particular salience where, as here, a challenged law was passed in response to a perceived crisis that transpired eighty years ago and aspires to recreate the world as it existed just before the outbreak of the first world war.

It bears emphasizing that the changed-circumstances doctrine is not a rule about how the Constitution itself changes, a rule about how courts ought to strike down unpopular laws when public sentiment turns, or a rule allowing courts to institute their own social and economic policies. The meaning of the Constitution remains the same, public sentiment is irrelevant, and courts may not substitute their preferences for those of the elected branches. Instead, taking changed circumstances into account

simply ensures that when Government officials curtail someone's liberty *today*, they do so for reasons that are constitutional in the real world *today*, not merely for reasons that were constitutional as the world was generations ago.

This doctrine of changed circumstances applies across the full breadth of constitutional law. In the First Amendment context, for example, in *McCutcheon v. FEC*, the Court refused to evaluate the rationality of aggregate limits on campaign contributions in light of the outdated facts that had been presented when it originally upheld those limits in 1976; it instead demanded evidence about the *current* state of the world. 134 S. Ct. 1434, 1456 (2014); *see also Edwards v. District of Columbia*, 755 F.3d 996, 1004 (D.C. Cir. 2014) (rejecting the Government's reliance on a 1927 *Washington Post* article because "[r]eliance on decades-old evidence says nothing of the present state of affairs").

The Court recently invoked changed circumstances to invalidate a portion of the Voting Rights Act of 1965. In *Shelby County v. Holder*, the Court invalidated measures that certain jurisdictions were required to implement to guarantee ballot access because those measures were predicated on "decades-old data and eradicated practices." 133 S. Ct. 2612, 2617 (2013); *see also Kirkpatrick v. Preisler*, 394 U.S. 526, 535-36 (1968) (rejecting old voting district map because changes in transportation and communications had rendered it obsolete in terms of promoting equal representation); *Karcher v. Daggett*, 462 U.S.

725, 733 (1983) (holding redistricting not in good faith because modern technology had negated New Jersey's traditional justifications for not ensuring equal representation).

The Court has struck down obsolete laws that burden interstate commerce. For example, the Court found in *Granholm v. Heald* that states' "health and safety" justifications for bans on direct shipment of wine by out-of-state wineries have been made obsolete by advances in technology that have allowed state regulatory bodies to monitor out-of-state wineries cheaply, easily, and efficiently. 544 U.S. 460, 492 (2005) (striking down state laws burdening or prohibiting direct shipment of wine from out-of-state wineries); *see also Kassel v. Consol. Freightways Corp. of Delaware*, 450 U.S. 662, 672 (1981) (striking down truck-length statute because obsolete rules "are of limited relevance on modern interstate highways"); *Am. Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 301-02 (1987) (O'Connor, J., dissenting) ("Significantly changed circumstances can make an older rule, defensible when formulated, inappropriate, and we have reconsidered cases in the dormant Commerce Clause area before.").

This Court has also long recognized that the changed-circumstances doctrine applies in contexts where judicial deference is thought to be at its maximum. For example, the Court held in the seminal rational-basis decision *United States v. Carolene Products* that a plaintiff can overcome the presumption of constitutionality by proving that the factual premises

for a law are no longer true, and therefore, that the enforcement of the obsolete law today would be irrational. 304 U.S. 144, 153 (1938) ("[T]he constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist."). The statute at issue in *Carolene Products* was eventually invalidated in 1972 on changed-circumstances grounds. *Milnot Co. v. Richardson*, 350 F. Supp. 221, 225 (S.D. Ill. 1972).

II. THE EXACTIONS ANALYSIS MUST BEGIN WITH RECOGNIZING HOW CIRCUMSTANCES HAVE CHANGED SINCE CONGRESS ENACTED THE STATUTE AT ISSUE TO COMBAT THE GREAT DEPRESSION BY TRYING TO RESTORE THE PRE-WORLD WAR I STATUS QUO.

As in other constitutional contexts, the exactions analysis must take changed factual circumstances into account. The factual premises of the Agricultural Marketing Agreement Act of 1937 ("AMAA") are not in dispute. The Great Depression caused widespread economic upheaval and dislocation. The AMAA is a relic from a bygone era, enacted in 1937 as a direct descendant of one of President Roosevelt's New Deal programs, created in reaction to market turmoil that had occurred during the Great Depression, out of a desire to recreate an agricultural market that existed during the farm economy era of 1910 to 1914. Those days are long gone, and today's global, industrialized

agricultural economy is a very different place from 1914.

The marketing order and agreement provisions of the AMAA first arose as part of President Roosevelt's Agricultural Adjustment Act. Act of May 12, 1933, ch. 25, 48 Stat. 31, *codified as amended at* 7 U.S.C. §§ 601-605, 607-623 (1994).

The overarching goal of the AMAA was to rectify the economic turmoil of the Great Depression in the mid-1930s by restoring the pre-WWI pricing structure by legislative command. The statute sought to accomplish this in two ways: (1) achieve and maintain "parity prices" for agricultural commodities; and (2) establish and maintain "orderly marketing conditions for agricultural commodities." 7 U.S.C. § 602(1); *see also Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 346 (1984). "Parity price" is defined in the statute as the product of an "adjusted base price" and a "parity index," both of which are based on "the general level of prices . . during the period January 1910 to December 1914, inclusive."[2] 7 U.S.C. § 1301(a)(1)(A), (B). The proposed "orderly marketing conditions" were meant to prevent "unreasonable fluctuations in supplies and prices" similar to what had occurred during

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[2] Although designed to "protect the interest of the consumer" 7 U.S.C. § 602(2), prices under this system have rarely achieved parity. Daniel Bensing, *The Promulgation and Implementation of Federal Marketing Orders Regulating Fruit and Vegetable Crops Under the Agricultural Marketing Agreement Act of 1937*, 5 San Joaquin Agric. L. Rev. 3, 5 n.10 (1996).

the Great Depression, just prior to the enactment of the AMAA. 7 U.S.C. § 602(4); *see also Horne v. U.S. Dep't of Agric.*, 133 S. Ct. 2053, 2056-57 (2013). President Roosevelt and Congress looked to the most recent period of relative economic stability – the years immediately preceding World War I – and sought to use the AMAA to recreate that pre-war status quo.

The California Raisin Marketing Order, 7 C.F.R. § 989.54 (the "CRMO"), is the Department of Agriculture's effort to implement the AMAA for raisins. 7 C.F.R. § 989.55 (providing that recommendations from the California Raisin Administrative Committee, 7 C.F.R. §§ 989.26-39, about the annual "free" and "reserve" percentages for raisins acquired by handlers are subject to the approval of the Secretary of Agriculture, who is to ensure that the percentages "will tend to effectuate the declared policy of the [AMAA]").

To put the challenged regulations in the context of the changed-circumstances doctrine, the two factual premises of the AMAA and CRMO have long ceased to exist. There is no possible debate that the Great Depression of the 1930s is still underway. Nor is it rationally possible to argue that the federal Government in 2015 needs to keep fighting the Great Depression of the 1930s by imposing the pricing structure of the pre-WWI era on the raisin market. Indeed, just to state what the Government is trying to do – address the Great Depression by trying to recreate a century-old status quo – is to demonstrate the irrationality of what the Government is trying to do.

Significantly, this is not a garden-variety policy argument. Instead, it is a *constitutional* argument that the factual premises of the challenged law have so utterly disappeared that enforcing the law today is arbitrary. The flagrant arbitrariness of enforcing the raisin marketing orders in 2015 is evident in the fact that similar marketing orders governing other agricultural products have been terminated over the past 30 years without any detrimental effects. *See* Dennis M. Gaab, *The California-Arizona Citrus Marketing Orders: Examples of Failed Attempts to Regulate Markets For Agricultural Commodities*, 5 San Joaquin Agric. L. Rev. 119, 125-26 (1995) (discussing the abandonment of several AMAA marketing orders in the 1980s and 1990s, including those for grapefruits, tart cherries, plums, navel and Valencia oranges, and lemons).[3] Moreover, the AMAA proceeds from premises about the basic structure of the agricultural market that are no longer true: In practice, the AMAA functions primarily by placing regulatory restrictions on "handlers," *i.e.*, packing houses and processing plants, for the benefit of "growers." But, as evidenced by the Petitioners in this case, it is not only unclear that "growers" require protection from "handlers" in the modern market; it is unclear that "growers" and "handlers" are even coherent categories in today's global,

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[3] Similarly, this Court need not address whether the AMAA was a constitutional response to the perceived crisis when it was passed in the 1930s because no reasonable person believes that "crisis" continues to persist today.

industry-heavy agricultural economy. *See* Daniel Bensing, *The Promulgation and Implementation of Federal Marketing Orders Regulating Fruit and Vegetable Crops Under the Agricultural Marketing Agreement Act of 1937*, 5 San Joaquin Agric. L. Rev. 3, 8 (1996) ("While there may often be some overlap and community of interest between handlers and growers, the AMAA is the product of an era when small, independent growers were frequently left to the mercy of large handlers who could benefit from their market power and position.").

This Court cannot be willfully blind to the drastic change in circumstances here any more than the Court could be willfully blind to the fact in *Shelby County*, for example, that the world of 2013, however imperfect in terms of race relations, was not the world of 1965. Just as the Constitution dictates that the enforcement of the Voting Rights Act must reflect those changes over a generation, so too does the Constitution dictate that the enforcement of much older agricultural laws must reflect changed circumstances.

III. IN 2015, THE GOVERNMENT HAS NO PLAUSIBLE REASON FOR REQUIRING THE HORNES TO TURN OVER A HUGE FRACTION OF THEIR RAISIN HARVEST WITHOUT COMPENSATION.

The changed-circumstances doctrine is relevant here because the fundamental question in this case – like in any Takings Clause case – is *why* the

Government is seizing the property in question. The preceding discussion establishes that the underlying seizure in this case is based on an agricultural crisis that has almost passed from living memory, and that the only reason the Government is imposing the burdens in question is that the Hornes (and other raisin farmers) insist on growing and selling raisins in 2015 instead of doing so in 1915. That simple fact is fatal to the Government's case.

A core purpose of the Takings Clause is to prevent "[g]overnment from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *see also First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304, 321 (1987) (explaining that the Just Compensation Clause is one of many constitutional provisions "designed to limit the flexibility and freedom of governmental authorities"). This means, among other things, that the Government may not "'by *ipse dixit* transform private property into public property without compensation. . '" *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1031 (1992) (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980)). In other words, Government may act to prevent *harmful* uses of property – such as common-law nuisances – but it may not (without compensation) simply seize property that, for policy reasons, it thinks it can put to better use. *Id.*

The simplest illustration of that universal principle is this Court's longstanding exactions doctrine,

which holds that the Government may not impose conditions on the use of property that are unrelated to any burdens the proposed use would place on the Government (or the public). *See Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

That doctrine has longstanding roots in federal law. In the classic case of *Parks v. Watson*, for example, the owner of property in Oregon sought to construct apartment units. 716 F.2d 646, 649-50 (9th Cir. 1983). One problem was that streets had been planned theoretically across the land, but were never built. In land use parlance, they were merely "paper streets," – that is, they had existence only on paper, not in reality. Although the city was generally amenable, it concluded that it would only vacate the paper streets if the landowner gave the city property containing valuable geothermal wells. The property owner balked, sued, and won. *See id.* And the owner won because the city's demand for geothermal property was unrelated to the city's proffered benefit of allowing the apartments to be constructed. *Id.* at 652.

This Court built on *Parks* in its landmark *Nollan* decision (considered in tandem with *First English* and decided two weeks later). *See Nollan*, 483 U.S. at 839 (noting that its conclusion is "consistent" with *Parks*). There, in exchange for a permit to replace a rundown beach cottage with a modern home, the California Coastal Commission demanded an easement for public passage across the privately owned sand between the home and the ocean. *See id.* at 827-30. The Supreme Court struck down the condition as an unlawful taking without compensation,

likening it to "an out-and-out plan of extortion." *Id.* at 837. The test there applied was that such a condition is unconstitutional unless the development caused a public problem that the condition would resolve, and unless the condition served the same purpose as denying the permit completely. *See id.*

In its later exactions jurisprudence, this Court continued to emphasize the need to evaluate the kind and degree of harm that the property owner was supposedly causing in order to determine if the Government could demand exactions without compensation. In *Dolan v. City of Tigard*, the Court augmented its *Nollan* holding – that an exaction had to have a substantial nexus between the property exacted from the property owner and the burden the proposed project would place on the community) – adding that there needed to be "rough proportionality" between the burden the project would place on the community and the *quid pro quo* demanded by the Government in exchange for a development permit. 512 U.S. 374, 398 (1994). In so doing, the Court refused to simply defer to the city's decision. Instead, it placed the burden on the city to justify its action. *See id.* at 391 n.8.

Here, as in *Dolan*, the burden should be on the Government to show how the Hornes' actions of handling and selling raisins place a burden on the community and how the exactions imposed by the Government ameliorate that burden in a proportional way. The problem is that the "burden" supposedly imposed by the Hornes is no burden on anyone, much less a burden on the raisin-consuming or

raisin-producing public. The Hornes have simply failed to conform their agricultural production to the long-obsolete standards of the 1914 market. The nation has changed over the course of 100 years, however, and the Hornes should not have to bear the financial burden of the Government's refusal to adjust the law in the face of that change.

If the Government insists on conditioning the Hornes' use of their raisin crop on turning over more than a third of that crop to the Government's discretionary use, then the Government must be able to explain how this condition relates to or helps ameliorate the danger of allowing the Hornes to sell their crop. *Cf. Stephenson v. Binford*, 287 U.S. 251, 275 (1932) (rejecting Government condition where "the use of the highways furnished a purely unrelated occasion for imposing the unconstitutional condition"). And the Government cannot do so.

Perhaps in 1937, the Government would have defended the takings at issue here by claiming that allowing the free-market sale of raisins would result in the catastrophic destruction of the entire agricultural economy. But however that argument would have fared in 1937, it cannot be seriously advanced now. This is doubly true in light of the fact that the argument today also would need to be that the free-market sale of raisins – but not grapefruits, tart cherries, plums, or other agricultural products free from AMAA marketing orders – would lead to this kind of catastrophe. That argument is simply unavailable here. Instead, there is only the Government's refusal

to change its laws in light of the modern agricultural industry – and its insistence that the only people who should bear the cost of that refusal are the Hornes and other farmers like them.

CONCLUSION

There comes a time to say "goodbye" to regulations so antiquated that they have become constitutionally intolerable. The Court has two such relics before it today in the CRMO and the AMAA. To the extent they ever had validity, their time has passed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
APR - 8 2015
OFFICE OF THE CLERK

No. 14-275

In The

Supreme Court of the United States

MARVIN D. HORNE, et al.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT

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The International Municipal Lawyers Association respectfully submits this brief *amicus curiae* in support of Respondent Department of Agriculture.[1]

INTERESTS OF *AMICUS CURIAE*

The International Municipal Lawyers Association ("IMLA"), an advocate and resource for local government lawyers since 1935, serves as an international clearinghouse for legal information and cooperation on municipal legal matters for its 3,000 members. IMLA frequently appears before the Court as *amicus curiae* to represent the interests of its members in cases that may affect local governments. IMLA has a major interest in this case for two reasons. First, Petitioners' proposal that the Court create a new *per se* category to govern takings claims based on impairments of possessory interests in personal property, including commercial products sold to the public, would interfere with a variety of local government regulatory activities that are essential to maintaining public health and safety and upholding important community values. Second, Petitioners' request that the Court adopt the novel theory that property owners, in

[1] Pursuant to Supreme Court Rule 37.6, IMLA states that no counsel for any party authored this brief in whole or in part, nor did any person or entity, other than *amicus curiae*, make a monetary contribution to the preparation or submission of this brief. This brief is filed with the written consent of all the parties.

general, can flout any law and then raise the Takings Clause as a defense to sanctions for doing so would undermine local governments' ability to protect important features of the built and natural environments.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents a novel set of facts that Petitioners and their *amici* seek to exploit to upend longstanding takings principles. IMLA urges the Court to reject this effort. There are few economic programs similar to the raisin marketing program and almost none at the local government level. Nevertheless, local governments tow illegally parked vehicles, remove unwholesome food from store shelves and prohibit its sale, and remove abused and neglected animals from their owners. Subjecting these and other similar government interferences with possessory interests in personal property to a *per se* takings rule would seriously interfere with local governments' authority to protect public health and safety. Likewise, Petitioners' proposal to revolutionize takings doctrine by allowing property owners to routinely flout laws and then raise the Takings Clause as a defense to sanctions for doing so would have serious adverse effects on local governments. Apart from the fact that Petitioners' argument lacks any foundation in the Constitution, acceptance of this argument would encourage frequent violations of zoning laws, historic

preservation ordinances, and other local rules and regulations, threatening the economic health and livability of our communities.

The simplest and most direct way to resolve this complex case is to recognize that Petitioners, in their capacity as handlers, never owned any raisins and therefore cannot assert a taking of their "private property." The text of the Takings Clause and numerous Court precedents confirm that ownership of "private property" is an essential precondition for a viable takings claim. Petitioners' case founders at the threshold because (1) they are litigating this case solely in their capacity as raisin "handlers" and (2) Petitioners, in their capacity as handlers, never owned any raisins. Petitioners seek to support their claim by pointing to property interests held by raisin producers, but a takings claimant cannot rely on an alleged taking of property belonging to somebody else.

Even if Petitioners could overcome the lack of a protected property interest (they cannot), the Court should reject Petitioners' request that it create a new *per se* rule for alleged takings based on interferences with possessory interests in personal property. The Court has previously adopted categorical *per se* rules for two narrow categories of regulatory takings cases involving infringements of rights in land: total denials of all economically viable use of land, and permanent physical occupations of real property. Both of these *per se* takings rules are rooted in the special character of private property interests in land, and do not logically support the creation of a different *per se*

rule applicable to personal property. Furthermore, the Court's justifications for the *Lucas per se* rule affirmatively argue against a new *per se* rule for government interferences with possessory rights in personal property, especially commercial products such as raisins.

The Court has generally eschewed mechanical *per se* rules because they restrict the courts' ability to consider the factors that, in "fairness and justice," ordinarily should be considered in making a reasoned judgment about whether a taking has occurred, including the adverse economic impact (if any) of the government action, the degree of interference with reasonable investment-backed expectations, and the character or purpose of the government action. In the case of personal property—particularly fungible commercial property that has been heavily regulated for many decades—application of a *per se* rule is especially likely to produce outcomes that fail the tests of fairness and justice. The purpose and effect of the Raisin Marketing Order are to confer substantial economic benefits on raisin growers, at considerable expense to the consuming public, and applying a *per se* rule in this case would risk conferring an additional unfair windfall on growers at further public expense.

Finally, IMLA urges the Court to reject the argument of Petitioners and several of their *amici* that property owners, in general, should have the option under the Takings Clause either to pursue a claim for just compensation or to refuse to comply with a law

because they think it constitutes a taking and defend against any subsequent penalties for noncompliance by invoking the Takings Clause. Petitioners make this argument despite the fact that the Court in *Horne I* already determined, based on the specific statutory scheme governing this case, that Petitioners can present any takings argument they may have in the context of this case. The much broader, novel remedies theory Petitioners are now advancing is contrary to established precedent and settled principles. The exclusive remedy for an alleged taking of private property for public use is ordinarily a suit for just compensation. In exceptional cases, like this one, when an alleged taking is for other than a "public use," or if "just compensation" is not an available remedy, property owners are not required to pursue the compensation remedy. In either of these circumstances, owners can invoke the Takings Clause as a defense to sanctions for not complying with the law (or seek to enjoin the government from acting). But, absent these circumstances, the exclusive remedy for a taking is a suit for just compensation. In sum, there is no merit to Petitioners' argument that property owners, generally speaking, can defy laws they believe constitute takings and then litigate the takings issue in response to government enforcement actions.

ARGUMENT

I. Petitioners' Takings Claim Fails as a Matter of Law Because Petitioners, in Their Capacity as Handlers, Never Owned Any Raisins.

The most straightforward basis for affirming the judgment of the Ninth Circuit is that Petitioners, in their capacity as handlers, never owned any raisins and therefore cannot assert viable claims that the Raisin Marketing Order threatened them with a taking of their property. *See* Br. for Resp't 51-55. The text of the Takings Clause makes clear that ownership of private property is an essential predicate for a viable takings claim: "Nor shall *private property* be taken for public use, without just compensation." U.S. Const. amend. V (emphasis added). Numerous Court precedents illustrate that a takings claimant must identify the private property allegedly taken. *See, e.g., Phillips v. Wash. Legal Found.*, 524 U.S. 156, 163-71 (1998); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160-61 (1980). Indeed, the requirement that a takings claimant point to a protected property interest is such an essential requirement that the Court has raised *sua sponte* the lack of predicate property interest and rejected a takings claim on the merits on that basis. *See E. Enters. v. Apfel*, 524 U.S. 498, 539-45 (1998) (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 554-56 (Breyer, J., dissenting, joined by Stevens, Souter and Ginsburg).

Petitioners' case founders for lack of a property interest because (1) Petitioners are litigating this case *solely* in their capacity as raisin "handlers" and (2) Petitioners, in their capacity as handlers, never owned any of the raisins grown by raisin producers. From the beginning of this case it was ambiguous in what capacity Petitioners were litigating their claim; after all, the United States argued in *Horne v. Department of Agriculture* (*Horne I*), 133 S. Ct. 2053 (2013), that Petitioners should have pursued a claim for just compensation in the Court of Federal Claims because they were making a takings argument in their capacity as producers. However, in *Horne I*, the Court clarified that Petitioners are litigating this case not as producers but solely in their capacity as handlers. In their capacity as handlers, Petitioners have no protected property interest in any raisins, and therefore their case fails as a matter of law. *See E. Enters. v. Apfel*, 524 U.S. at 543 (Kennedy, J., concurring in the judgment and dissenting in part) ("We have been careful not to lose sight of the importance of identifying the property allegedly taken.").

The Court's opinion in *Horne I* is replete with confirmations of the fact that Petitioners are litigating this case *solely* in their capacity as handlers, and not as producers. *See* 133 S. Ct. at 2060 ("[T]he civil penalty, assessment, and reimbursement for failure to reserve raisins were all levied on petitioners in their capacity as 'handlers.'"); *id.* ("It is undisputed that the Marketing Order imposes duties on petitioners only in their capacity as handlers."); *id.* at

2061 ("Given that fines can only be levied on handlers, petitioners' takings claim makes sense only as a defense to penalties imposed upon them in their capacity *as handlers*.") (emphasis in original); *id.* ("The relevant question, then, is whether a federal court has jurisdiction to adjudicate a takings defense raised by a handler seeking review of a final agency order."); *id.* at 2062 ("petitioners (as handlers)"); *id.* at 2063 ("[p]etitioners (as handlers)"); *id.* at 2064 ("petitioners, in their capacity as handlers").

It is also clear that Petitioners, as handlers, were at no time owners of any of the raisins allegedly threatened with a taking. Under the Agricultural Marketing Agreement Act ("AMAA"), handlers acquire custody of raisins designated as "reserve-tonnage raisins," but they do so "'for the account'" of the Raisin Administrative Committee, an agent of the United States, meaning that the United States acquires an ownership interest in the raisins. *Id.* at 2058. In addition, raisin producers retain a property interest in the raisins they produce, even after the raisins are transferred to handlers as "reserve-tonnage raisins," because they have a right to the profits from sale of the reserve raisins. *Id.* But handlers are not owners of any of the reserve raisins. As the Department of Agriculture Judicial Officer explained, handlers "acquired" the raisins within the meaning of the Marketing Order, but "acquire" is "a term of art that does not encompass an ownership interest," App. to Pet. for Cert. 122a; as Petitioners have correctly maintained from the outset of this litigation, "[T]itle to the raisins

never transferred from the grower to Mr. Horne and partners under California law." *Id.* at 121a-22a.

Because Petitioners are litigating this case solely as handlers, and handlers have no ownership interest in any raisins, Petitioners have no viable claim under the Takings Clause. *See E. Enters. v. Apfel*, *supra*; *see also Bowen v. Gilliard*, 483 U.S. 587, 605 (1987) (rejecting takings claim because plaintiffs had no property right for takings purposes to continued welfare benefits at same level); *Danforth v. United States*, 308 U.S. 271, 284 (1939) (the property owner "at the time of the taking" is the only party entitled to assert a claim under the Takings Clause); *cf. Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992) (stating that a takings claim fails at the threshold if "background principles" of property or nuisance law preclude a takings claimant from establishing a protected property entitlement).

Petitioners' attempt to rely on the property interests of producers to support their takings argument not only conflicts with basic takings doctrine but also with the Court's reasoning in *Horne I*. In *Horne I* the government contended that the District Court lacked jurisdiction over this case because Petitioners could present their argument that the government took producers' property by filing suit in the Court of Federal Claims. The Court rejected that argument. In so ruling the Court refused to conflate the Petitioners' status as handlers with their status as producers, insisting that "the Marketing Order imposes duties on petitioners *only* in their capacity as

handlers." 133 S. Ct. at 2060 (emphasis added). Given this logic, Petitioners, in their capacity as handlers, cannot now assert takings claims based on property interests owned, not by them as handlers, but rather by them in their capacity as producers or by other producers.

Understandably, Petitioners want to try to have their cake (present their takings argument in the District Court without regard to their ability, as producers, to sue for just compensation) and eat it too (prosecute their takings claim in the District Court by invoking the property interests they hold as producers). But *Horne I* forecloses this strategy.

Importantly, the conclusion that Petitioners lack a viable takings claim does not mean that the Raisin Marketing Order can never be challenged as a taking, or even that Petitioners, as producers, cannot present their takings argument in court. It simply means that, under the specific jurisdictional scheme created by the Agricultural Marketing Agreement Act, raisin growers such as Petitioners are required to pursue their claims in the conventional fashion—by filing a suit for just compensation in the U.S. Court of Federal Claims. That option was always open to them and it is open to them in the future. What the Court should not countenance, however, is permitting Petitioners to assert without factual foundation a property interest in raisins they do not own.

As the Department of Agriculture correctly observes, *see* Br. for Resp't 54, there is no unfairness in Petitioners having to pay fines and penalties for

violating the law. This outcome is simply the result of the risk Petitioners took in pursuing their ill-fated scheme to escape the legal rules that other members of the industry comply with. Moreover, Petitioners, as producers, gained significant economic benefits by selling their entire crop in the open market in violation of the Marketing Order, and these benefits offset the burden of the fines and other penalties being imposed on them as handlers.[2]

II. The Court Should Reject Petitioners' Invitation to Create a New *Per Se* Takings Category for Interferences with Possessory Interests in Personal Property.

Apart from the fact that Petitioners' case fails for lack of a protected property interest, the Court should

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[2] Petitioners' lack of a property interest in raisins might also be considered through the lens of standing doctrine. A litigant "generally must assert his own rights and interests, and cannot rest his claim to relief on the legal rights and interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975); *see also Andrus v. Allard*, 444 U.S. 51, 64 n.21 (1979) (ruling that a plaintiff lacked standing to assert a taking of property "owned by others"). The Court has sometimes allowed litigants to represent the interests of third parties where the third party lacks the ability to sue to defend its own rights, *see, e.g., Eisenstadt v. Baird*, 405 U.S. 438, 446 (1972), but that exception could not apply here, given that producers are perfectly capable of suing in the claims court. *See also Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 n.3 (2014) (observing that the Court has not resolved whether the prohibition on assertion of third-party claims is a prudential limitation on standing or a requirement of Article III of the Constitution).

reject Petitioners' proposal that the Court create a new *per se* takings rule that would govern alleged takings based on interferences with possessory interests in personal property, including goods sold to the public. The multi-factor *Penn Central* analysis represents the Court's "polestar" for determining whether a governmental action constitutes a taking, *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 336 (2002) (citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978)), and there is no sound reason to depart from that approach in evaluating takings claims based on interferences with possessory interests in personal property. Petitioners assert that precedent of this Court establishes that a *per se* rule applies in this context, but they cite no authority actually supporting that assertion and, so far as we can determine, there is no such authority.

The Court has identified two categories of regulatory takings cases in which a *per se* test applies in lieu of the fact-specific analysis of *Penn Central*.[3] First, the Court has said that *per se* "categorical treatment" is appropriate "where regulation denies all economically beneficial or productive use of land." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992). Second, the Court has said that regulations

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[3] The Court has articulated other, special tests for cases involving development exactions. *See Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 386 (1994). We agree with Petitioners that these tests do not apply here.

resulting in "permanent physical occupations" of property will be deemed to be takings "without regard to other factors that a court might ordinarily examine." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432 (1982). *But cf. Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 522 (2012) (declining to extend this *per se* rule to *temporary* physical occupations of private property).

Both of these *per se* rules arose from cases involving land and are based on the unique character of rights in land, and therefore do not support petitioners' proposal for a quite different *per se* rule covering personal property. The *Lucas* case involved a takings claim based on a coastal regulation that deprived the owner of all economically viable use of his land. 505 U.S. at 1009. The *Lucas* Court stressed that the *per se* rule it announced in that case was explained and justified by the special character of rights in real property; "[*i*]*n the case of land*," the Court said, "we think the notion pressed by the Council that title is somehow held subject to the 'implied limitation' that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture." *Id.* at 1028 (emphasis added). In subsequent cases, the Court has stressed that this *per se* rule only applies to total denials of all use of real estate. *See, e.g.*, *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001) (ruling that there was no *Lucas* taking where owner

could build one substantial residence on an 18-acre parcel).

Loretto reviewed a regulation that mandated the permanent placement of cable television equipment on a private apartment building. The Court again emphasized that the case involved real property, justifying the application of a *per se* rule by observing that, "[w]hen faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking." 458 U.S. at 426-27. The Court described a permanent physical occupation of real property as "qualitatively more intrusive than perhaps any other category of property regulation," *id.* at 441, and noted that "[e]arly commentators viewed a physical occupation of real property as the quintessential deprivation of property." *Id.* at 430 n.7. The Court has repeatedly declined to extend the *per se* rule articulated in *Loretto* beyond required, permanent physical occupations of real property. *See, e.g., Yee v. City of Escondido*, 503 U.S. 519, 530 (1992); *United States v. Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989).

In addition to not supporting Petitioners' proposed *per se* rule, the *Lucas* decision explicitly contradicts Petitioners' proposed rule as applied to the specific kind of property at issue in this case. "[I]n the case of personal property," the Court said, "by reason of the State's traditionally high degree of control over commercial dealings, [a property owner] ought to be aware of the possibility that new regulation might even render his property economically worthless (at

least if the property's only economically productive use is sale or manufacture for sale)." 505 U.S. at 1027-28. In other words, the *Lucas* Court categorically exempted personal property from the *Lucas per se* rule, at least in the case of personal property sold in commerce or produced for sale. This exemption obviously applies to raisins grown and processed for sale to the public.

Furthermore, the *Lucas* Court justified the *per se* rule for denials of all use of land by observing that a "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." *Id.* at 1017. Because the *Lucas* Court justified the *per se* rule it announced by analogizing a regulation that deprives the owner of all use of land to an "appropriation," and the Court categorically excluded commercial personal property from the scope of the *per se* rule, the *Lucas* decision supports the conclusion that, whatever rule may apply to appropriations in general, a *per se* rule should not apply to "appropriations" of personal property, at least when the property is sold in commerce.

There is no debate that government interference with possession represents a serious impairment of property interests. Indeed, appropriations of personal property may commonly result in takings, as the cases cited in Petitioners' brief amply demonstrate. And physical seizures of real property are especially problematic under the Takings Clause. *See Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518

(2012) (discussing cases addressing seizures of real property interests). But the specific question presented by this case is whether the Court should create a categorical *per se* rule for alleged takings based on impairments of possessory interests in personal property, including commercial goods. Adoption of such a *per se* rule would preclude the courts, *in every case covered by the rule*, from considering the facts and circumstances of the particular case, including the character and purpose of the government action, whether claimants have suffered any economic loss, and whether there has been any interference with their reasonable investment-backed expectations. There is no warrant in the Court's precedents or the logic of its decisions for adopting this new *per se* rule. *See Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 163 (1980) (holding that government appropriation of interest accruing on an interpleader fund was a taking, but observing that "*[n]o police power justification is offered for the deprivation*") (emphasis added); *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 235 (2003) (assuming, but only for the sake of argument, that a requirement that interest earned in bank accounts be transferred to the Washington Legal Foundation was "akin" to a *per se* taking, and then rejecting the takings claim on the merits).

Furthermore, the proposed *per se* rule would be unworkable in practice. Local governments are commonly compelled to impair possessory interests in personal property for a wide variety of important

public purposes and it is unthinkable that all such actions could be *per se* takings. Every-day examples of such "appropriations" by local governments include towing illegally parked automobiles, removing unwholesome food from store shelves and prohibiting its sale, and removing abused and mistreated pets and other animals from the care of neglectful owners. None of these actions can be takings, much less *per se* takings. *See Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 713, 730-31 (1865) ("[A] bale of goods, laden with infection, may be seized under 'health laws,' and if it cannot be purged of its poison, may be committed to the flames."). Other levels of government engage in similar kinds of interferences with possessory interests, such as seizures of adulterated and dangerous drugs or of pirated copyright materials. These types of interferences with possessory interests may raise important statutory, common law or even constitutional questions in some instances. But the mere fact that the government is physically "appropriating" property cannot, by itself, support an automatic finding of a taking. *See Bennis v. Michigan*, 516 U.S. 442, 452 (1996) (ruling that abatement of an owner's interest in an automobile pursuant to a Michigan forfeiture law did not constitute a taking under the Fifth Amendment).

The Court's *per se* rules relating to real property are subject to exceptions based on "background principles" of nuisance and property law, *Lucas*, 505 U.S. at 1027-30, and these background principles certainly can defeat takings claims involving personal property

interests. But these background principles are too narrow in scope to exempt from takings liability the full range of government impairments of personal property interests, especially in commercial products, that have traditionally been recognized as entirely acceptable. That is almost certainly why the *Lucas* Court, in addition to recognizing that background principles will defeat "total" takings claims, independently exempted the entire universe of commercial personal property from the *Lucas* rule. *See* Brief for the United States as *Amicus Curiae* in Support of Reversal, *Lucas v. S.C. Coastal Council*, No. 91-453, 1991 WL 11004086, at *13-15 (cataloguing examples illustrating why the *per se* denial-of-all-economically-viable use rule could not sensibly be applied to many types of personal property); *cf. Lucas v. S.C. Coastal Council*, 505 U.S. at 1013 (Kennedy, J., concurring in the judgment) (observing that, in the case of coastal land, nuisance doctrine "cannot be the sole source of state authority to impose severe restrictions," given the "unique concerns" raised by "a fragile land system").

This particular case also illustrates why the proposed *per se* rule for alleged takings based on interferences with possessory interests in personal property should be rejected. The purpose of the Takings Clause is to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The fundamental problem with applying a *per se* rule in this case is that it would compel the courts to ignore all of the features of the raisin marketing

program which suggest that, as a matter of fairness and justice, the public should *not* be required to pay Petitioners under the Takings Clause. These features include the fact that the program has been in place for many decades and Petitioners voluntarily entered this heavily regulated industry many years ago; Petitioners cannot now assert that the continued operation of the raisin marketing program interferes in the least with their reasonable investment-backed expectations. To the contrary, Petitioners have sought to evade the rules of the raisin marketing program in an attempt to secure a new, special benefit for themselves at the expense of other, law-abiding members of the industry. The purpose of the raisin marketing program and the lack of adverse economic effect on Petitioners also weigh against the claim.

While the general goal of the raisin marketing program is to maintain an "orderly" market in raisins, the most direct and immediate beneficiaries of the program are members of the raisin industry. The Raisin Marketing Order was promulgated "at the request of the raisin industry," App. to Pet. for Cert. 44a, and it persists today only because a majority of producers have not voted to repeal it. *See* 7 U.S.C. § 608c(16)(B). Its basic purpose is to restrict the market supply of raisins in order to prop up raisin prices, largely for the benefit of raisin growers. *See Horne v. Dep't of Agric.*, 750 F.3d 1128, 1143 (9th Cir. 2014) ("[The] program does not overly burden the producer's ability to compete while reducing *to the producer's benefit* the potential instability of this particular market.") (emphasis added); *Horne v. Dep't of Agric.*, 2009

WL 4895362, at *23 (E.D. Cal. Dec. 11, 2009) ("[T]he 'primary focus' of the market control program is to 'maximize return to the grower.'") (quoting Daniel Bensing, *The Promulgation and Implementation of Federal Marketing Orders Regulating Fruit and Vegetable Crops Under the Agricultural Marketing Agreement Act of 1937*, 5 San Joaquin Agric. L. Rev. 3, 6 (1995)).

In addition, the Raisin Administrative Committee ("RAC"), which oversees the implementation of the Marketing Order, is composed almost entirely of raisin producers and handlers. The industry's self-evident motivation in supporting this system of self-regulation has been to create what amounts to an industry-wide cartel to control the market supply of raisins and increase the profits of raisin growers. Absent government authorization, the program would appear to be a *per se* violation of Section 1 of the Sherman Antitrust Act. *See Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19-20 (1979) (stating that a "practice [that] facially appears to be one that would always or almost always tends to restrict competition or decrease output," will be deemed a *per se* violation of Section 1 of the Sherman Antitrust Act).

The primary losers under this program, of course, are consumers, who are forced to pay more for raisins than they would under competitive market conditions. *See* Brief for the Cato Inst. et al. as *Amici Curiae* in Support of Petitioners 6 ("[T]he [RAC] does consumers no favors either: its creation of 'artificial raisin-scarcity drives up prices.'") (quoting *Why Does America Regulate the Trade in Raisins?*,

The Economist (April 14, 2013)).[4] On the other hand, to the extent the program succeeds in raising prices for any raisin producer, it raises prices for all raisin producers, including those who wish it did not exist at all. If this Court were to apply a *per se* takings rule and overrule the prior precedent that the program does not result in a taking, raisin producers who already benefit from this publicly-subsidized program would reap a windfall at public expense. The litigation parade might be led by Petitioners and other industry dissidents, but it is difficult to see why many other moderately self-interested raisin growers would not also file claims for financial compensation. The upshot would be that the costly public subsidy now enjoyed by the raisin industry would be expanded at still more public expense. This outcome would cynically mock the principles of fairness and justice that are supposed to govern takings law.[5]

We recognize that Petitioners and their *amici* contest the factual accuracy of the foregoing account of how the Marketing Order benefits raisin growers

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[4] Whether the raisin marketing program continues to merit support by Congress does not, of course, affect the issue of whether the program results in a taking.

[5] Adopting Petitioners' proposed *per se* rule also would be unfair to raisin growers who both comply with the Marketing Order and decline to sue the government under the Takings Clause; their continued compliance with the Order ensures that the market supply of raisins is still constrained, making it possible for law-breakers and/or takings claimants to continue to reap windfalls.

at public expense. *See* Br. for Pet'rs 25-26; Brief of the DKT Liberty Project and Eighteen Independent Raisin Growers as *Amici Curiae* in Support of Petitioners 4-19. Setting aside the merits of that response, simply by making the argument Petitioners acknowledge the common-sense intuition that economic fairness must be a relevant consideration in this case, a concession that is inconsistent with Petitioners' argument for a *per se* rule. The ultimate bankruptcy of Petitioners' position is revealed by the fact that, according to their legal theory, their economic arguments are ultimately mere coloration under a *per se* rule. According to their position, even if it is correct that the Marketing Order significantly enriches raisin producers at great public expense, they are still entitled to invoke a *per se* rule that would enrich them still further at yet further public expense. In the interest of fairness and justice, the Court should not adopt a new *per se* rule that would support such an outlandish result.[6]

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[6] Petitioners contend that the government could achieve the same market supply outcome by restricting sales, without necessarily requiring that reserve raisins be handed over to the RAC. Br. for Pet'rs 25. It seems odd to think that a taking would be less likely if the government required surplus raisin production to rot in the sun rather than be put to productive use, including paying over the net proceeds from raisin sales to raisin growers. In any event, this argument simply reinforces why a *per se* takings test is inappropriate; it is just this kind of case-specific question about the purpose of the program that can be weighed under *Penn Central*, but not under a *per se* test.

III. A Property Owner Generally Cannot Defend Against Sanctions for Violating a Law on the Ground that Enforcement of the Law Would Result in a Taking of Private Property for Public Use.

In all events, the Court should reject the argument by Petitioners and several of their *amici* that property owners, in general, are entitled to violate a law they believe constitutes a taking and then raise the Takings Clause as a defense to sanctions for doing so. *See* Br. for Pet'rs 20, 27-31; Brief of the States of Texas, Arizona and North Dakota as *Amici Curiae* in Support of Petitioners 12-14; Brief of Washington Legal Foundation as *Amicus Curiae* in Support of Petitioners 26-27. In *Horne I* the Court ruled that Petitioners, as handlers, can raise the takings issue as a defense to the sanctions being imposed on them in this case, given that the special AMAA jurisdictional provisions bar them from suing for just compensation in the Court of Federal Claims. Petitioners and their *amici* are now making a much broader argument: that property owners in general can always raise the takings issue as a defense to sanctions for violating laws alleged to be takings, even when the just compensation remedy is available. The Court should reject this broader argument.[7]

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[7] *See generally* John D. Echeverria, *Eschewing Anticipatory Remedies for Takings: A Response to Professor Merrill*, 128 Harv. L. Rev. F. (forthcoming Apr. 10, 2015).

A taking of private property involves an exercise of eminent domain, the governmental power to take private property from individual citizens to advance the common good. The power of eminent domain is an inherent attribute of sovereignty that precedes the Constitution; as the Court put it long ago: Eminent domain "appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty." *Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878). The Takings Clause—"nor shall private property be taken for public use, without just compensation"—places conditions on the exercise of the eminent domain power. Specifically, it prohibits a taking if it is for other than a "public use," or if the taking is without "just compensation." By the same token, the Takings Clause, by its terms, places *no* constraint on the eminent domain power so long as it is exercised for a public use and just compensation is available.

With respect to the just compensation requirement, the Takings Clause does not require that compensation be offered "in advance of or even contemporaneous with the taking" in order to satisfy the Takings Clause. *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 11 (1990). "All that is required is the existence of a reasonable, certain and adequate provision for obtaining compensation at the time of the taking." *Id.* (internal quotation and citation omitted). In addition, a successful takings claimant is constitutionally entitled to prejudgment interest as part of the compensation award. *Seaboard Air Line Ry. v. United States*, 261 U.S. 299, 306 (1923). Thus, in

practice, awards of just compensation equitably protect property owners from the economic losses occasioned by takings for public use.

In accord with this basic understanding of the eminent domain power and the Takings Clause, the Court has repeatedly affirmed that the Takings Clause "is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of a taking." *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314 (1987) (emphasis in original). Thus, "[I]n general, '[e]quitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to a taking.'" *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127-28 (1985) (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984)); *see also Preseault*, 494 U.S. at 11-17; *Ruckelshaus*, 467 U.S. at 1016; *cf. Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 544 (2005) (repudiating the "substantially advance" takings test in part because it implied, contrary to this long line of authority, that a successful takings claim might support a grant of injunctive relief).

For example, a farmer opposed to the Keystone pipeline cannot sue under the Takings Clause to block the taking of her property for a right of way for the pipeline, so long as just compensation is available, absent a showing the taking is unauthorized or otherwise not for a public use. Likewise, if a local government is regulating land use to protect the community

and the owner has the opportunity to seek compensation for any taking that might result, the owner cannot invoke the Takings Clause in a bid to block the regulation. The Takings Clause imposes the same basic constraints on takings regardless of whether the government is condemning private property or the owner has brought an inverse condemnation action.

The Court has said that, in exceptional cases, the courts can block government from taking private property, but only when the taking is *not* for a public use or just compensation is *not* an available remedy. Thus, invoking the public use requirement, the Court has said that a taking may be enjoined if the taking would serve an illegitimate purpose, *see Kelo v. City of New London*, 545 U.S. 469, 477-78 (2005), or is contrary to some other law. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). Similarly, invoking the just compensation requirement, the Court has said that an owner can seek to enjoin a taking if no forum is available in which to sue for compensation, *see Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 697 & n.17 (1949) (discussing *United States v. Lee*, 106 U.S. 196 (1882)), or if the alleged taking would generate "potentially uncompensable damages." *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 94 n.39 (1978). In accord with these precedents, a plurality of the Court has adopted the presumption that Congress has not provided a just compensation remedy if an alleged taking involves money, on the theory that Congress could not sensibly embrace the pointless, circular exercise of forcing a citizen to sue the government to give back money the government is simultaneously

taking from that citizen. *See E. Enters. v. Apfel*, 524 U.S. 498, 521 (1998) (plurality opinion).

These exceptional cases do not detract from the general principle that the exclusive remedy for a taking for a public use is a suit for just compensation, so long as that remedy is actually available. Indeed, because these exceptions only apply either when the taking is not for a public use or just compensation is not available, they collectively uphold and reaffirm the understanding that an injunction is *not* available if a taking is for a public use and just compensation is available. Because the eminent domain power is an inherent attribute of sovereignty, so long as the taking is for a public use and just compensation is available, a court order based on the Takings Clause blocking a taking would be an illegitimate exercise of judicial power in derogation of the authority of the other branches of government. *See Hurley v. Kincaid*, 285 U.S. 95, 104 (1932) ("[E]ven if the defendants are acting illegally, under the Act, in threatening to proceed without first acquiring flowage rights over the complainant's lands, the illegality, on complainant's own contention, is confined to the failure to compensate him for the taking, and affords no basis for an injunction if such compensation may be procured in an action at law.").

There are relatively few cases involving efforts by property owners to defend against monetary sanctions for violating the law by arguing that enforcement of the law would result in a taking. *See, e.g., Mo. Pac. Ry. Co. v. Nebraska*, 217 U.S. 196 (1910), discussed below. It is self-evident, however, that

property owners can defend against sanctions by raising a takings objection only if they can properly seek to enjoin the government from proceeding with the taking. Permitting a property owner to defy the law and avoid sanctions for doing so under the Takings Clause is functionally equivalent to allowing a property owner to enjoin the government from taking private property. In either case, if the property owner's argument prevails, she can stop the government from acting.

Petitioners cite *Missouri Pacific Railway Co. v. Nebraska*, 217 U.S. 196 (1910), as support for their argument that "fines for refusal to submit to unconstitutional takings may be challenged under the Takings Clause." *See* Br. for Pet'rs 30. In that case the Court allowed a railroad to raise the Takings Clause as a defense to a sanction for violating a law requiring railroads to build side rails at the request of grain elevator operators. 217 U.S. at 208. But the Court justified this approach by observing that Nebraska law provided no procedure for claiming just compensation for a taking. *See id.* at 205 ("It will have been noticed that there is no provision in the statute for compensation to the railroad for its outlay in building and maintaining the side tracks required."). This decision fits squarely within the line of exceptional cases recognizing that parties can seek to enjoin, or avoid sanctions for violating, laws that allegedly take private property when there is no opportunity to seek just compensation. *Missouri Pacific Railway Co.* does not support the argument that property owners can raise the Takings Clause as a defense to a sanction

imposed for violating a law alleged to be a taking when there *is* an opportunity to sue for just compensation.

Petitioners also cite *Village of Norwood v. Baker*, 172 U.S. 269 (1898), for the proposition that a property owner can resist a monetary sanction by invoking the Takings Clause, *see* Br. for Pet'rs 29, but that unique case does not support their theory either. In that case, the government, confronted by the high cost of condemning a parcel of property, attempted to impose a special charge on the owner in order to raise the funds necessary to finance acquisition of the property. The Court saw through this gambit and declared that the charge violated the Takings Clause. This narrow precedent serves simply to "prevent[ ] circumvention of the Takings Clause by prohibiting the government from imposing a special assessment for the full value of a property in advance of condemning it." *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2608-09 (2013) (Kagan, J., dissenting). *Village of Norwood* does not support the different and much broader theory advanced by Petitioners that a property owner, at her option, can defy any law and raise the Takings Clause as a defense to sanctions for doing so.

The Court has stated, as a general proposition: "[O]ne cannot be punished for failing to obey the command of an officer if that command is itself violative of the Constitution." *Wright v. Georgia*, 373 U.S. 284, 291-92 (1963). Thus, a citizen can generally raise other provisions of the Bill of Rights as a defense to

the imposition of sanctions for disregarding a law if the law is unconstitutional. *See, e.g., Williams-Yulee v. Fla. Bar*, U.S. Supreme Court, No. 13-1499 (addressing whether sanctions for violating a Florida law barring candidates running for office from soliciting campaign contributions violate the First Amendment). But this general proposition does not apply in cases arising under the Takings Clause; if the conditions of the Takings Clause are met, the Takings Clause provides no basis for seeking to void sanctions for violating the law.

Nor does this mean that the Takings Clause is in any sense a "poor relation" to other constitutional rights. *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994). The fact that, generally speaking, the Takings Clause cannot be raised as a defense to sanctions for breaking the law simply reflects the fact that, unlike most other provisions of the Constitution, the Takings Clause is not designed to prevent government from acting but instead creates a right to compensation when a government action amounts to a taking for public use. *See United States v. Causby*, 328 U.S. 256, 267 (1946). In addition, the Court has said that the requirement to pay compensation under the Taking Clause is "self-executing," meaning that no congressional recognition of a right to sue is required to ensure its enforcement. *United States v. Clarke*, 445 U.S. 253, 257 (1980). In sum, there is no need to make a special effort to rescue the Takings Clause from some mythical lesser status.

Allowing property owners to routinely raise a takings argument against sanctions for violating the law would have serious adverse effects on local governments' ability to advance important public goals. As the Court explained in its landmark decision in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), after a court rules that a regulation represents a taking requiring payment of just compensation, government officials have a range of options. They cannot avoid liability for a temporary taking from the date the taking occurred, but they can rescind or modify the regulation to eliminate liability going forward. *Id.* at 317. Alternatively, they can decide that the government objective is so important that they wish to continue to enforce the regulation, even if they have to bear the unanticipated financial burden of paying compensation under the Takings Clause. *Id.*

Allowing property owners to routinely raise a takings defense to sanctions based on their violations of the law would make the government's options far more limited. If a property owner violates a regulation and a court subsequently rules that enforcement of the regulation would have constituted a taking, the public purpose of the regulation is completely thwarted. This outcome contradicts the function of the Takings Clause, which is "not to limit the governmental interference with property rights per se, but rather to secure *compensation* in the event of a taking." *Id.* at 314 (emphasis in original).

The magnitude of the harms local governments and their citizens would suffer from this novel interpretation of the Takings Clause would vary depending on the facts and circumstances. For example, a community might seek to preserve a historic landmark. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978). Under the traditional understanding of the Takings Clause, the government can insist on enforcing a law protecting the landmark, while accepting the risk of incurring financial liability under the Takings Clause. Under Petitioners' approach, however, property owners would be granted a license under the Takings Clause to violate the law and destroy the historic landmark, leaving the government only the option of pursuing sanctions. The prospect of imposing sanctions would be useless in term of advancing the community's goal of protecting the landmark, contrary to the purpose and design of the Takings Clause. Many other examples can easily be imagined where authorizing property owners with takings objections to violate the law could seriously and irreparably damage valuable resources.

Petitioners attempt to assign great significance to the fact that the penalties imposed in this case were based, in part, on the market value of the raisins they and other growers declined to place in reserve. They suggest that, at least when the penalty for breaking the law is the "dollar equivalent" of what a court would award in just compensation if the law were complied with, an order blocking sanctions for violating the law is indistinguishable from a

compensation award for a taking. The economic impact of these options may be comparable from the property owner perspective, but these alternatives are hardly the same from the governmental perspective, for the reasons discussed above. In any event, the premise of the argument is mistaken, because in this case the sanctions included an assessment of several hundred thousand dollars over and above the market value of the raisins that the Hornes and other growers declined to place in reserve. In other cases the sanctions a property owner might incur for violating a law could be much greater or much less than the potential compensation award if the owner complied with the law and prosecuted a takings claim. *See, e.g.*, 33 U.S.C. § 1319(g)(3) (criteria for assessing penalties under the Clean Water Act); 20 U.S.C. § 1268(a) (criteria for assessing penalties under the Surface Mining Control and Reclamation Act). The merits of Petitioners' theory cannot possibly depend on the specific size of the monetary sanctions imposed for violations of the law.

Finally, the Court should reject the theory articulated by the Ninth Circuit, based on the decision in *Koontz*, that a property owner should be permitted to raise a takings argument in opposition to sanctions for violating the law. *See Horne v. Dep't of Agric.*, 750 F.3d 1128, 1137-38 (9th Cir. 2014). In *Koontz* the Court addressed the question of whether the *Nollan/Dolan* standards that apply to traditional development exactions should also apply to monetary exactions. To support the conclusion that they should, the Court reasoned that monetary exactions can properly be

viewed as takings for the purpose of applying the *Nollan/Dolan* framework because they "'operate upon . . . an identified property interest,'" that is, the property the owner is seeking to develop. 133 S. Ct. at 2599 (quoting *E. Enters. v. Apfel*, 524 U.S. at 540 (Kennedy, J., concurring in the judgment and dissenting in part)). The Ninth Circuit argued that, just as in *Koontz* the "link" between a monetary exaction and a piece of real property justifies applying the *Nollan/Dolan* standards to a monetary exaction, the link between the monetary sanctions in this case and property interests in raisins justifies evaluating the constitutionality of the sanctions by evaluating whether implementation of the Marketing Order would have resulted in a taking. *Horne*, 750 F.3d at 1137.

The Court should reject this extravagant and unwarranted reading of *Koontz*, which in any event was unnecessary in light of the ruling in *Horne I* that Petitioners can challenge the sanctions in this case. The *Koontz* Court focused on the question of the scope of the application of the *Nollan/Dolan* standards, and nothing in the Court's discussion of that issue supports the very different argument that an owner can routinely raise the Takings Clause as a defense for violating the law. The simple fact that there was a link between money and property in *Koontz* and that there is also an arguable link between monetary sanctions imposed on Petitioners and property interests in raisins (owned by somebody else) is of no analytical significance and does not support the Ninth Circuit's theory supposedly based on *Koontz*. Furthermore, the *Koontz* Court expressly reaffirmed that just compensation is the traditional remedy for a taking ("the

Fifth Amendment mandates a particular *remedy*—just compensation—only for takings," 133 S. Ct. at 2597) (emphasis in original), directly contradicting the Ninth Circuit's expansive interpretation of *Koontz*.

In sum, there is no debate that Petitioners, as handlers, in this particular case can raise the Takings Clause as a defense to the sanctions being imposed on them, given that the usual just compensation remedy is closed to them. But the Court should reject the broader argument of Petitioners and their *amici* that property owners, in general, can raise the Takings Clause as a defense to sanctions for violating laws alleged to be takings, even when the just compensation remedy is available.

CONCLUSION

For the foregoing reasons and for the reasons stated in the brief of the Respondent Department of Agriculture, the Court should affirm the judgment of the U.S. Court of Appeals for the Ninth Circuit.

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April 8, 2015

No. 14-275

In the Supreme Court of the United States

Supreme Court, U.S.
FILED
MAR 4 - 2015
OFFICE OF THE CLERK

MARVIN D. HORNE, et al.,
Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF BAYLEN J. LINNEKIN AND KEEP FOOD LEGAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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March 4, 2015

QUESTION PRESENTED

1. Whether the government's "categorical duty" under the Fifth Amendment to pay just compensation when it "physically takes possession of an interest in property," *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012), applies only to real property and not to personal property.

2. Whether the government may avoid the categorical duty to pay just compensation for a physical taking of property by reserving to the property owner a contingent interest in a portion of the value of the property, set at the government's discretion.

3. Whether a governmental mandate to relinquish specific, identifiable property as a "condition" on permission to engage in commerce effects a per se taking.

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INTERESTS OF *AMICI CURIAE*[1]

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Linnekin's scholarly research frequently reveals and discusses the historical origins of rights we enjoy as Americans—particularly as they relate to historical protections and/or violations of rights in food. As described below, the Takings Clause, which is at the heart of the questions presented in the instant case, has its origins in protecting individuals against governmental takings of food.

Linnekin's scholarly writings have appeared in many scholarly publications, including the *Wisconsin Law Review*, *Hastings Constitutional Law Quarterly*, *Chapman University Law Review*, *Northeastern University Law Journal*, *Oxford Encyclopedia of Food and Drink in America*, *Routledge International Handbook of Food Studies*,

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Besides *amici curiae* and their counsel, no party has made a monetary contribution to this brief's preparation and submission. The parties have consented to the filing of this brief.

and elsewhere. Linnekin has presented his scholarly research at Harvard Law School, Yale Law School, University of Chicago Law School, Duke Law School, Tulane Law School, Pepperdine Law School, University of Kentucky Law School, and many other top law schools and universities.

Linnekin's opinion pieces on food and law have been published by the *New York Post*, *Baltimore Sun*, Huffington Post, and many others. He has offered expert commentary on BBC Radio, Fox Business Channel, and dozens of other radio and TV programs and has been quoted by the *Wall Street Journal*, *Washington Post*, *Los Angeles Times*, *Politico*, *Wilson Quarterly*, *ABA Journal*, Reuters, and many others.

Linnekin earned an LL.M. in agricultural and food law from the University of Arkansas School of Law, a J.D. from Washington College of Law, an M.A. in learning sciences from Northwestern University, and a B.A. in sociology from American University.

Amicus Keep Food Legal Foundation is a Washington, DC-based 501(c)(3) nonprofit established in 2012 that promotes food freedom—the right of every American to grow, raise, produce, buy, sell, share, cook, eat, and drink the foods of their own choosing. Keep Food Legal Foundation's work serves to educate the American public and the legal community about the historical origins and current exercise of rights as pertains to food. Those rights—specifically, those enumerated in the Fifth Amendment's Takings Clause—and their history are at issue in the instant case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Ninth Circuit Court of Appeals erred when it determined that the raisin Marketing Order program does not produce a violation of the Takings Clause. The Ninth Circuit's decision runs afoul not just of the historical origins of the Takings Clause, which arose largely out of an effort to protect personal property rights in food, but also contradicts decisions made by this Court and other federal courts.

The Takings Clause of the Fifth Amendment of the U.S. Constitution protects Americans against governmental takings of private property.[2] The protections guaranteed by the clause mean government may only take private property for public use, and must in such instances provide just compensation to a property owner.

The Takings Clause traces its origins to two key precepts of English law. While Magna Carta gave rise to the compensation principle in 1215, a key 1606 legal case established the public use principle. "The underlying concept of the Fifth Amendment had been recognized in England as early as 1215 with the signing of the Magna Carta. One of the earliest eminent domain cases in England, known as the *Saltpetre* case, confirmed this principle[.]" Dean Allen Floyd II, *Irrational Basis: The Supreme Court, Inner Cities, & the New*

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[2] U.S. CONST. amend. V, cl. 4. ("[N]or shall private property be taken for public use, without just compensation.").

"Manifest Destiny," 23 Harv. BlackLetter L.J. 55, 66 n.90 (2007).

The relevant language and substance of these canons served to establish and protect personal property rights in food. Protection of such rights preceded similar recognition of real property rights both in England and in the American colonies where, in 1641, Massachusetts established the first protection against uncompensated takings (of cattle and other personal property).

In the years prior to and during the American Revolution, the British increasingly violated the colonists' personal property rights in food. James Madison drafted the Takings Clause in order to protect the property rights of Americans by preventing the government from engaging in any such future abuses.

The essential food-related origins of the Takings Clause suggest that courts should interpret the Takings Clause most broadly in cases where the government takes personal property, particularly food. In such cases, courts should afford those subject to government takings the full power of the Takings Clause.

The Ninth Circuit ignored this Court's Takings' Clause jurisprudence and erred when it applied the *Nollan/Dolan* analysis to the Hornes' raisins. *See Horne v. U.S. Dep't of Agric.*, 750 F.3d 1128, 1143-44 (9th Cir. 2014) *cert. granted sub nom. Horne v. Dep't of Agric.*, No. 14-275, 2015 WL 213643 (U.S. Jan. 16, 2015). Analysis of the Marketing Order under the framework provided in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) is most appropriate because the Marketing Order effectively allows the Secretary to seize the

raisins or fine the handler, essentially taking from the handler either the literal fruits of his labor or—in the form of fines—the figurative fruits of that labor.

ARGUMENT

THE ORIGINS OF THE FIFTH AMENDMENT'S TAKINGS CLAUSE IN THE PROTECTION OF FOOD AS PERSONAL PROPERTY REQUIRES THE GOVERNMENT TO COMPENSATE PETITIONERS.

A. The Need to Protect Against Uncompensated Takings of Food Established the Basis of Protecting Property Rights in England

1. Magna Carta, the compensation principle, and the protection of personal property rights in food

Magna Carta, the English charter of individual rights, adopted in 1215, established that a taking of personal property by the King was only just when accompanied by fair and immediate compensation. This is the first known expression in law of such a principle. *See* James Ely, Jr., *"That Due Satisfaction May Be Made:" The Fifth Amendment & the Origins of the Compensation Principle*, 36 Am. J. Legal Hist. 1, 15 (1992) ("The right to an indemnity when property was taken can be traced to Magna Carta[.]").

Specifically, Magna Carta prohibited any officer acting on behalf of the King from taking personal property—including, specifically, corn—from a property owner without providing immediate

compensation.[3] *Magna Carta* ch. 28 (1215) ("No constable or other royal official shall take corn or other movable goods from any man without immediate payment, unless the seller voluntarily offers postponement of this.").

The King could take food because it was part of his recognized purveyance. *See, e.g.*, 1 William Blackstone, *Commentaries* *287 (defining purveyance as "a right enjoyed by the crown of buying up provisions and other necessaries... for the use of his royal household, at an appraised valuation, in preference to all others, and even without the consent of the owners"). The purveyance was essential for the King, who often traveled between his properties and who, without relying on this mandate to his subjects, might otherwise have gone hungry. William Sharp McKechnie, *Magna Carta: A Commentary on the Great Charter of King John, with an Historical Introduction* 329 (1914) (noting the King "move[d] constantly" and that "difficulties must have been great of finding sufficient food"). But Magna Carta commanded he could not take food from any subject without paying the property owner immediately.

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[3] The term "corn" here refers generally to grains, as corn was unknown to Europeans and would remain so until the discovery of the New World hundreds of years later. *See* Peter Barton Hutt & Peter Barton Hutt II, *A History of Government Regulation of Adulteration and Misbranding of Food*, 39 FOOD DRUG COSM. L.J. 2, 3 n.6 (1984) ("As used here and in other early sources, 'corn' probably refers to grain in general.").

2. The Saltpetre Case, *the public use requirement, and growth of personal property rights in food*

The Case of the King's Prerogative in Saltpetre[4] centers on a traditional food ingredient. Saltpetre is a naturally occurring compound made from decaying organic matter, and is often found in barns.[5] Saltpetre has been used for centuries to cure and brine food. *See, e.g.*, T. Williams, *The Accomplished Housekeeper, and Universal Cook* 228-33 (1797) (noting the necessary use of saltpetre in curing hams, tongue, bacon, beef, and various other foods); Fergus Henderson, *The Whole Beast: Nose to Tail Eating* 76 (2004) (finding saltpetre "a little too ferocious" for his palate, the renowned modern English nose-to-tail chef and cookbook author recommends brining instead in sea salt).

The King valued saltpetre for its other use: as a key component in gunpowder,[6] which just the year before this court's decision had been used in a plot to blow up Parliament. *See, e.g.*, Philip Sidney, *A History of the Gunpowder Plot* (1905). The *Saltpetre Case* established the King's authority to empower his

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[4] 12 Co. Rep. 15, 77 Eng. Rep. 1294 (1606) (K.B.) [hereinafter the *Saltpetre Case*].

[5] Saltpetre is potassium nitrate. *Webster's New Collegiate Dictionary* 1039 (9th ed. 1989). Saltpetre is formed through the decay of organic matter like manure. *See* Paul Forchheimer, *The Etymology of Saltpetre*, 67 Modern Lang. Notes 103, 103-04 (1952).

[6] *See* the *Saltpetre Case* at 1297 (holding that the Crown could take saltpetre for making gunpowder so long as it did so in service of defending the realm).

servants to dig for saltpetre on private property. "[T]his taking of saltpetre is a purveyance of it for the making of gunpowder for the necessary defence and safety of the realm." *The Saltpetre Case* at 1295.

The *Saltpetre Case* made no provision for compensating a property owner subject to a taking of saltpetre.[7] But the case protected an individual's personal property rights in their food by setting strict limits on the scope of the King's servants' ability to take saltpetre. First, the case buttressed a property owner's simultaneous right to dig for and use saltpetre on his own land. "The owner of the land cannot be restrained from digging and taking saltpetre." *Id.* at 1295. The court stated the alternative would deny the property owner "the commodity of his own land." *Id.* at 1296.

Second, the court barred the King's servants from using saltpetre for any culinary purposes, stating that saltpetre dug and taken from a property owner "cannot be converted to any other use than for the defence of the realm. for which purpose only the law gave the King this prerogative[.]" *Id.* at 1295. Third, the court restricted where the King's servants could dig for saltpetre, and specified they could not dig for it in any immediate area where other food was stored. "The King's servants cannot undermine or impair any walls or foundation of any houses of any nature; nor can they dig in the floor of the mansion-house for saltpetre; nor can they dig in the

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[7] The necessity of defending the realm made this the *Saltpetre Case* an exception to the general compensation rule established in Magna Carta.

floor of any barn for the custody of corn, hay, &c[.]" *Id.*

So important was the prohibition on impairing an individual's personal property rights in food that the court again stated that the King's servants could not "dig the floor of any barn employed for the safe custody of any corn[.]" *Id.* at 1294. And while the court permitted the King's servants to dig in larger spaces where food was stored, it did so only insofar as "sufficient room for the necessaries of the owner [existed]" and so long as any "wine, beer, and other necessary provision of the owner be not removed, or in any sort impaired."[8] *Id.* at 1296. The court also required the King's servants to "repair" any damaged property "in convenient time, in so good plight as it was before[.]" *Id.*

History shows the King's servants often failed to heed these requirements. *See* Thomas B. Nachbar, *Monopoly, Mercantilism, & the Politics of Regulation*, 91 Va. L. Rev. 1313, 1344 n.144 (2005) (noting public scorn directed at the King's saltpetre servants); Unsigned, *The Saltpetre Man*, N.Y. Times, Nov. 12, 1899 (listing the abuses of the King's "hated.... saltpetre men," from whom "no householder was free from their visits," who rarely obeyed takings rules, who unjustly requisitioned animals for carting away their takings, and who generally abused property rights to such an extent that these servants were "one of the factors in the national irritation which made the [English] civil war possible"). Still, the

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[8] Notably, the case declared a property owner's wine—which, like raisins, is an agricultural product made by aging grapes—could not be taken by the King's servants under any circumstances.

Saltpetre Case's protection of personal property rights in food was part of the growing recognition of property rights that arose toward the end of feudalism. *See* Joseph H. Lazzarotti, *Public Use or Public Abuse*, 68 UMKC L. Rev. 49, 53 (1999) (noting that rights in and protections of property arose at the end of the feudal era). Like the English themselves, the establishment of personal property rights in food would soon secure a beachhead in the New World.

3. Blackstone recognized key links between agriculture, society, and personal property rights in food

England's most influential and widely published legal scholar during the Founding Era, Sir William Blackstone, recognized the importance of establishing personal property rights in livestock animals as a means of establishing a stable agricultural society.

> The article of food was a more immediate call, and therefore a more early consideration. Such, as were not contented with the spontaneous product of the earth, fought for a more solid refreshment in the flesh of beasts, which they obtained by hunting. But the frequent disappointments, incident to that method of provision, induced them to gather together such animals... and to establish a permanent property in their flocks and herds, in order to sustain themselves in a less precarious manner[.] 2 William Blackstone, *Commentaries* *5.

Blackstone also recognized the importance of the compensation principle. "But how does [the legislature] interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained." 1 William Blackstone, *Commentaries* *139. Blackstone cited no authority for his discussion of the compensation principle. *See* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 786 n.15 (1995). But Blackstone, who wrote the first scholarly work on Magna Carta, knew its origins better than did anyone. *See* William Blackstone, *The Great Charter and Charter of the Forest, with Other Authentic Instruments* (1759). And he was no doubt familiar with the case that had established the public use principle. *See* 4 William Blackstone, *Commentaries* *159 (referencing the King's saltpetre men).

B. America's First Colonists Protected Personal Property Rights in Food

1. Personal property rights in food codified in 1641

Personal property rights in food, including the proscription against uncompensated takings, were quick to find a home in Britain's American colonies. In 1641, shortly after the Massachusetts Bay Colony was settled, the colony adopted a declaration of liberties, which contains the first colonial takings law. The law barred takings of cattle and other goods for public use without a court order, required

payment for the taking, and mandated compensation in the event a cow or goods were damaged or destroyed.

> No mans Cattel or goods of what kind soever shall be pressed or taken for any publique use or service, unlesse it be by warrant grounded upon some act of the generall Court, nor without such reasonable prices and hire as the ordinarie rates of the Countrie do afford. And if his Cattle or goods shall perish or suffer damage in such service, the owner shall be sufficiently recompenced." Massachusetts Body of Liberties 8 (1641), *reprinted in Sources of Our Liberties: Documentary Origins of Individual Liberties in the United States Constitution and Bill of Rights* 148, 149 (Richard L. Perry & John C. Cooper eds., 1952) (original spelling and grammar preserved).

The compensation principle evident in the Massachusetts Body of Liberties comes from Magna Carta. *See* Treanor at n.12 ("This provision of the Body of Liberties appears to have been model[]ed on Article 28 of Magna Carta[.]") The public use principle—along with provision for the consideration of damage to property—appears for two key reasons to be taken from the *Saltpetre Case*. First, the case was widely known, thanks to the limits it had established on the King's feared saltpetre men. Second, the author of the Massachusetts Body of Liberties, Nathaniel Ward, began practicing law in England one year after the *Saltpetre Case* was decided, and would certainly have been familiar with

the case. *See* New England Historical Society, *The New England Historical and Genealogical Register* 325 (1889) (noting Ward's admission to one of London's Inns of Court in 1607).

It is noteworthy that the Massachusetts Body of Liberties, this first proscription against takings in the colonies, pertained solely "to the seizure of personal property"—including, expressly, an animal used for food, cattle—rather than to real property. *See* Treanor at 784. Like Magna Carta and the *Saltpetre Case* before it, Massachusetts had recognized personal property rights in food that acted as a bulwark against food-related takings.

During much of America's pre-Revolutionary history, the English honored the principle that just takings required compensation. *See* Ely at 4. But in the years leading up to and including the Revolutionary War, British troops systematically subjected American colonists to regular and increasingly harsh food laws. They did so first through a series of unprecedented regulations.

The Sugar Act of 1764[9] was an entirely new sort of law in that it "involved the principle of the direct taxation of the colonies for imperial purposes." Oliver M. Dickerson, *The Navigation Acts and the American Revolution* 186 (1951). The Act, which spurred cries of "taxation without representation," imposed "so high a duty on all foreign sugar, melasses (sic), and rum" that it served to ban these extremely popular products. Stephen Hopkins, An Essay on the Trade of the Northern Colonies, Newport Mercury, Feb. 6, 1764, *reprinted in Tracts of*

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[9] 4 Geo. III c. 15.

the Revolution 1763-1776 3, 15 (Merrill Jensen ed., 1967). It also served to ban wine. *See* Dickerson at 177 (noting the Act "practically terminated the American distributing trade in wine and transferred much of it to the British wine merchants"). The Sugar Act was followed in short order by the Tea Act (which undercut American tea merchants and smugglers);[10] Quartering Acts (which required colonists to house and provide specific enumerated foods to British troops);[11] and Fisheries Act (which took from New England fishermen the right to fish in rich North Atlantic waters).[12]

These provocations helped push the colonists to make war against the British, a war that began in Lexington and Concord before word of the Fisheries Act had even reached American shores in 1776. Even as the first shots of the Revolutionary War still rung, the British had begun a new campaign of violating the colonists' property rights in food. In fact, within hours of the initial battle of the Revolution at Lexington and Concord, British troops descended on the Munroe Tavern in Concord. *See* Elise Lathrop, *Early American Inns & Taverns* 81–82 (1917). Its proprietor, Mrs. William Munroe, wife of an American militia colonel, buried her family silver near a tree and fled the house shortly before the troops' arrival. *Id.* at 82. When the British arrived, they ate bread Mrs. Munroe "had baked that morning." *Id.* They also killed her sister's cow and

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[10] 13 Geo. III c. 44.

[11] 7 Geo. III c. 59; 14 Geo. III c. 54.

[12] 15 Geo. III c. 31.

forced her sister to feed an injured British soldier who the troops had quartered in her house. *Id.*

Similar uncompensated takings by the British would continue throughout the Revolutionary War, as the case of *Respublica v. Sparhawk* demonstrates.[13] It was no surprise, then, that when Thomas Jefferson wrote the Declaration of Independence, he saw it necessary to include in the document's grievances explicit mentions of British assaults on Americans' personal property rights in food. The Declaration of Independence harangues the King for permitting his troops to "eat out the[] substance" of colonists barns and cupboards, and chides the King for "plunder[ing] our seas." *The Declaration of Independence* (U.S. 1776).

In stark contrast to the actions of the British, many colonial legislatures sought to recognize and protect the personal property rights in food of their fellow Americans by passing laws to compensate colonists for food taken by hungry American troops. Ely at 13. ("Virginia empowered officials to take beef, pork, bacon, and salt for use by troops upon 'paying or tendering to the owner the price so estimated by the appraisers.'") South Carolina passed a law similar to Virginia's in 1779. *Id.* The compensation principle also spread to state constitutions. Both Vermont and Massachusetts enshrined the compensation principle in their respective state constitutions during the American Revolution. *Id.* at 15.

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[13] 1 U.S. (1 Dall.) 357 (1788) (taking of flour during wartime by British troops).

2. From personal property rights in food to the Fifth Amendment's Takings Clause

Courts often turn to the Declaration of Independence and the Bill of Rights—the wellspring and protector of Americans' enumerated and unenumerated rights—to answer questions about the origins and extent of our rights. They use that basis to help frame and give meaning to the exercise of a right. For this reason, key Supreme Court decisions sometimes rest on the whether and how members of the Court discern the reasons why the Founding Fathers sought to ensure the protection of particular fundamental rights.[14]

Despite this fact, courts have tended to give short shrift to the origins of the Takings Clause when deciding cases in which the protections afforded under the clause are at issue. *See* Richard Epstein, *Takings* 29 (1985) ("Historical arguments have played virtually no role in the actual interpretation of the clause."). The failure to embrace the origins of this fundamental right harms the both the Constitution and individual rights.

Where the origin of a right is known—particularly, as is the case with the Takings Clause, where the reason for enumerating the right in the Bill of Rights stems in part from British abuses of that right during the colonial period—courts should

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[14] See *McDonald v. Chicago*, 561 U.S. 742, 918-19 (2010) (Breyer, J., dissenting) (discussing "the Framers' basic *reasons* for including language in the Constitution") (emphasis in original); *District of Columbia v. Heller*, 554 U.S. 570, 662 (2008) (exploring "the reason" and "purpose for which [a] right was codified" in the Bill of Rights).

embrace that knowledge in order to give proper effect to the right. *Cf.* Ely at 2 ("[M]any provisions of the Constitution pertain to property interests and were designed to rectify abuses of the Revolutionary era."). For example, James Madison drafted the Third Amendment[15] to the U.S. Constitution as a clear reaction to violations of personal property rights in food under the Quartering Acts.[16] In the only case ever decided on Third Amendment grounds, the Second Circuit acknowledged and embraced that fact. *See Engblom v. Carey*, 677 F.2d 957, 967 (2d Cir. 1980) (noting that the Quartering Act of 1765 had required colonial tavern owners to "bear the cost of feeding" British troops).

The protections guaranteed by the Takings Clause are ancient in origin. *See* Ely at 4 ("Far from representing an innovation, the takings clause simply codified a long-standing constitutional principle upholding the right of compensation for property taken for public use.") Those origins lay in England—in Magna Carta and in the *Saltpetre Case*—and sprung from the need and desire to protect personal property rights in food. Its development continued in the New World, first in the form of the Massachusetts Body of Liberties in 1641.

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15 U.S. CONST. amend. III.

16 *See* note 11 and accompanying text. Together with the Takings Clause and the Third Amendment, the First Amendment, Second Amendment, Fourth Amendment, and Sixth Amendment each has a basis in protecting rights in food that were violated by the British before and during the American Revolution. Collectively, these rights in food are sometimes referred to as "food freedom."

When the British began to engage in systematic violations of colonists' personal property rights in food, laws and constitutional amendments that protected those rights sprang up in several states.

The Takings Clause of the Fifth Amendment extended to all Americans the protections of the compensation principle and public use requirement—an evolution that began in 1215. *See* Ely *Id.* at 18. ("The takings clause simply ratified and gave constitutional status to a long-settled principle, and generated no opposition during the ratification process.") The Takings Clause exists in the Bill of Rights in large part to protect personal property rights in food. *Cf.* Epstein at 27 ("The dominant motivation for the clause may have been the taking of food and supplies during time of war for the support of government troops.").

The protections of individual rights guaranteed under the Fifth Amendment's Takings Clause arose out of British and Colonial American acknowledgement and protection of a personal property rights in food. The language of the Takings Clause enshrined longstanding protections of personal property rights in food into the Bill of Rights. The clause was intended to ensure the new American government could not take food from private individuals and businesses for public use and without just compensation.

C. Under This Court's Jurisprudence, the Raisin Marketing Order is a Taking and Requires Just Compensation

Federal courts have long recognized the application of *per se* physical takings with regards to

personal property—often in cases pertaining to food. The origins of the raisin Marketing Order[17] that is at the heart of the instant case lies in the years immediately before and after World War II. Following World War II, the Court of Claims decided a series of cases concerning goods for which the government issued set-aside orders and reserve requirements as part of the war effort. *See Edward P. Stahel & Co. v. United States*, 78 F. Supp. 800, 804 (Ct. Cl. 1948); *Lord Mfg. Co. v. United States*, 84 F. Supp. 748, 754-55 (Ct. Cl. 1949); *Safeway Stores v. United States*, 93 F. Supp. 900, 901 (Ct. Cl. 1950); *Dore v. United States*, 97 F Supp. 239, 242 (Ct. Cl. 1951); *Arkansas Rice Growers Co-op. Ass'n v. United States*, 137 Ct. Cl. 442, 447 (1957). These cases pertained frequently to food—including meat and rice. Each involved a government order requiring a producer or handler to set aside an amount of their product, under government order, which the government would later compel the sale of for public use. In each case, the producer or handler faced steep fines for failure to comply with government mandates on sales and set-aside orders. The court in each case found that the government's actions constituted a physical taking requiring just compensation under the Fifth Amendment.

Though these cases transpired before the Supreme Court's Takings Clause jurisprudence developed specific analysis factors for *per se* takings, these cases provide examples of government action analogous to the marketing order that is at issue in

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[17] The Marketing Order is intended to regulate the country's raisin supply in an "orderly" fashion. 7 U.S.C. § 602(1).

the instant case. In those cases from the 1940s and 1950s, the Court of Claims held the government programs constituted physical takings of personal property that required just compensation. *See Dore* at 242 ("When, as here, the United States exercises its authority to order delivery and in its sovereign capacity forces the 'sale' of property to it for public use there is, in our opinion, a 'taking' and just compensation must be made."). In *Dore*, the Court noted that even though the government "did not go through the formal proceedings of requisitioning the rice," the actions taken nevertheless constituted a physical taking of the rice because the farmer faced forced sale or penalties. *Id.* In the Hornes' case, not only did they face steep penalties, but also the government required the Hornes to submit their raisins to handlers within the Raisin Administrative Committee ("RAC") to be held as reserve tonnage.[18]

The Hornes faced similar government orders as the farmers in *Dore*, though the RAC actually required more from the Hornes by demanding they give up physical control over their raisins to the government when they submitted to participating in the mandatory handler program. Although they retained title to the raisins, the title made no difference in the *Dore* or *Arkansas Rice Growers* cases because the forced submission to the government order, in face of monetary penalty, rendered the title to the property useless. *See Dore* at 242; *Arkansas Rice Growers* at 447 ("It was the mandatory nature of the set-aside order itself...

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[18] The RAC sets an annual "reserve tonnage," a percentage of the overall raisin crop. *See* 7 C.F.R. §§ 989.65–66.

which persuaded the court that the so-called sales were requisitions or takings."). Here, the government attempts to argue that the RAC never gains title to the raisins so a physical taking does not occur. However, whether or not the RAC gains title to the raisins has no bearing on their physical possession of the raisins. The Marketing Order gave the RAC the ability to control the raisins, use the raisins for collateral for loans, and dispose of the raisins, while using the proceeds from sales of the raisins to fund its own costs. *See* 7 C.F.R. §§989.66(g), 989.67(b)-(e). If the Hornes complied with the Marketing Order, they would have no control over the reserve tonnage raisins; rather they retain a minimal interest in the possible money left over from the sale of the reserve raisins—money which is neither guaranteed nor, frequently, a reality. 7 U.S.C. § 608(c)(6)(E). However, the retention of a residual share in the profits does not preclude a finding of a *per se* taking. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1018 (1992). When the government physically possesses and controls property to the extent the RAC controlled the reserve tonnage raisins, title and ownership of those raisins belongs to the government. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 431 (1982) ("Because there had been an 'actual taking of possession and control,' the taking was as clear as if the Government held full title and ownership.") (*quoting United States v. United Mine Workers*, 330 U.S. 258, 284-285 (1947) (plurality)). Such physical domination over the Hornes' raisins epitomizes a *per se* physical taking of their raisins by the government.

Declining to participate in the RAC would lead to steep penalties, leaving the Hornes with the

option either of turning over the raisins or paying the government the market value from the raisins that never entered the reserve pool. *See Horne*, 750 F.3d at 1142. Such an option is akin to the government demanding that a cattle farmer place a ten-pound portion of a cow into reserve or pay the government the corresponding market rate of steak. As in the instant case, such an arrangement would run afoul of the Takings Clause because it merely changes what the government is physically taking from the cow's owner. *See Lord Mfg. Co. v. United States*, 84 F. Supp. 748, 754-55 (Ct. Cl. 1949) ("Whether it be construed as a strongly worded order with which plaintiff reluctantly complied, or whether it be construed as a taking of private property. The net results as we see them are practically the same."). The government may refer to physical takings of personal property as marketing orders, but where raisin handlers face a mandate of physically turning over their raisins or paying the government for the value of those raisins, the government's rhetoric is akin to putting lipstick on a pig. *See Edward P Stahel & Co. v. United States*, 78 F. Supp. 800, 804 (Ct. Cl. 1948) ("To say that when the Government forbids an owner of property to make any other use of it, and requires him to sell it, upon request, to the Government... is not a taking of the property for public use, would be to make the constitutional right contingent upon the form by which the Government chose to acquire the use of the property.").

D. The Ninth Circuit Erred When it Failed to Recognize the Marketing Order as a *Per Se* Taking

At the crux of the Ninth Circuit's flawed ruling is its failure to apply a *per se* physical taking analysis to the Hornes' case, opting instead to employ the *Nollan/Dolan* analysis. *See Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994). The *Nollan/Dollan* analysis applies in situations where the government restricts the use of a person's real property. *See Horne v. U.S. Dep't of Agric.*, 750 F.3d at 1142 ("We apply the *Nollan/Dolan* rule here because we believe it serves to govern this use restriction as well as it does the land use permitting process."). The Marketing Order allows the government to take physical possession and control over the raisins. That makes a *Nollan/Dolan* analysis inapt. "When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner." *Tahoe–Sierra Pres. Council, Inc.*, 535 U.S. 302, 322 (2002) (*citing United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951)).

The RAC does not merely place a condition on the Hornes' use of their property. Rather, the RAC physically takes control of their raisins. The Ninth Circuit conflates the ability of the Hornes to grow other crops on their land with their ability to sell their raisins freely. *See Horne*, 750 F.3d at 1143 ("The Hornes, too, can avoid the reserve requirement of the Marketing Order by... planting different crops, including other types of raisins, not subject to this Marketing Order or selling their grapes without drying them into raisins.").

The Marketing Order is not a condition on the use of the Hornes' land that the Hornes can simply

avoid by growing different crops. The Marketing Order controls the crops themselves, granting the RAC possession and control over the reserve tonnage raisins. The Marketing Order physically takes the reserve raisins or issues penalties for the price of the raisins, and the government cannot construe it as a use restriction on the land that would qualify for a *Nollan/Dolan* analysis.

Rather, as discussed earlier, the Marketing Order does not serve merely to limit the Hornes' use of their property; it gives them only the option of surrendering their property or paying the equivalent, and serves as a permanent government occupation of property. Consequently, the most appropriate analysis for determining whether the Marketing Order constitutes a taking of the Hornes' raisin crop is *Loretto*. But the Ninth Circuit ignores this precedent and holds that the Constitution affords less protection to personal property than it does to real property, relying on its own misinterpretation of dicta from *Lucas*. *See Horne*, 750 F.3d at 1139–40. In *Lucas*, the Court mentions that the owner of personal property should be aware of the possibility that a regulation may render his property "economically worthless." *See Lucas*, 505 U.S. 1003. 1027–28. However, *Lucas* and the jurisprudence it spawned dealt with the diminishment of economic value of property, not physical seizure of property. *See id.*

Applying such logic to a case involving physical taking of personal property is improper, and confuses the existence of the physical taking in the Hornes' case with deprivation of an economic interest in their property. Furthermore, the Court in *Loretto* noted that physical seizure of "land or real property

is an obvious fact that will rarely be subject to dispute." *Loretto*, 458 U.S. 437. Here, there can be little dispute about the government's seizure of the reserve raisins by the very nature of the government's control and possession over the raisins. Additionally, although the Ninth Circuit refused to apply the analyses in *Lucas* or *Loretto* to the Hornes' case because those cases involved real property, not personal property, the Ninth Circuit has no issue with this distinction between property types when it applied the analyses of *Nollan/Dolan* to the Hornes' case, despite both *Nollan* and *Dolan* being cases involving real property. *See Horne*, 750 F.3d at 1143-44.

While the Ninth Circuit appears to have created an artificial distinction between real and personal property that would negate some rules but not others, such a distinction is not part of this Court's jurisprudence. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164–65(1980) (holding that state retention of interest constituted a taking); *Kimball Laundry v. United States*, 338 U.S. 1, 16 (1949) (stating that a temporary government seizure of a laundry company qualified as a taking of the owner's laundry trade routes). Other circuit courts have also treated real and personal property similarly. *See Nixon v. United States*, 978 F.2d 1269, 1284-85 (D.C. Cir. 1992) ("The actual holding of *Loretto* makes no mention of a distinction between real and personal property, nor was any rationale given in the opinion that might justify such a distinction."). Similarly, this Court has noted, in dicta, that personal property falls expressly within the category of property that might be subject

to a *per se* taking. *See United States v. Sperry Corp.*, 493 U.S. 52, 62 n. 9 (1989).

CONCLUSION

The Fifth Amendment's Takings Clause requires that the government compensate property owners when it takes property for public use. The clause protects real and personal property. From Magna Carta to the *Saltpetre Case* to the Massachusetts Body of Liberties, the origins of and purpose for the clause lay in protecting personal property rights in food. The Hornes deserve the full protection of the Takings Clause. Consequently, the Court should reverse the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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March 4, 2015

SUPREME COURT, U.S.
FILED
MAR 9 - 2015
OFFICE OF THE CLERK

No. 14-275

In The
Supreme Court of the United States

MARVIN D. HORNE, *et al.*,

Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the government's "categorical duty" under the Fifth Amendment to pay just compensation when it "physically takes possession of an interest in property," *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012), applies only to real property and not to personal property.

2. Whether the government may avoid the categorical duty to pay just compensation for a physical taking of property be reserving to the property owner a contingent interest in a portion of the value of the property, set at the government's discretion.

3. Whether a governmental mandate to relinquish specific, identifiable property as a "condition" on permission to engage in commerce effects a per se taking.

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.3, Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Petitioners.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

MSLF is a nonprofit, public-interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. MSLF has members who reside, own property, and work in all 50 states. Since its creation in 1977, MSLF attorneys have defended individual liberties and been active in litigation opposing governmental actions that result in takings of private property without just compensation. *See, e.g.*, *Brandt*

[1] Pursuant to Supreme Court Rule 37.3(a), all parties consent to the filing of this amicus curiae brief. Pursuant to Supreme Court Rule 37.6, the undersigned further affirms that no counsel for a party authored this brief in whole or in part, and no person or entity, other than MSLF, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

v. United States, 710 F.3d 1369 (Fed. Cir. 2013) (represented Plaintiff); *Laguna Gatuna, Inc. v. United States*, 50 Fed. Cl. 336 (2001) (represented Plaintiff); *Mountain States Legal Foundation v. Hodel*, 799 F.2d 1423 (10th Cir. 1986) (en banc) (represented Plaintiff); *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (amicus curiae); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (amicus curiae); *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276 (Fed. Cir. 2008) (amicus curiae).

Moreover, MSLF has a substantial interest in this case. The right to own and use personal property is central to many MSLF members' ability to earn a livelihood. Therefore, MSLF respectfully submits this amicus curiae brief, urging that the Court reverse the Court of Appeals.

STATEMENT OF THE CASE

This case involves a marketing order promulgated under the Agricultural Marketing Agreement Act of 1937 ("AMAA"), as amended, 7 U.S.C. § 601 *et seq.* In 1949, the Department of Agriculture implemented the *Marketing Order Regulating the Handling of Raisins Produced from Grapes Grown in California*, 7 C.F.R. § 989 (1993) ("Raisin Marketing Order"). The Raisin Marketing Order is implemented by the Raisin Administrative Committee ("RAC"), an agent of the USDA.

Unlike other marketing orders promulgated under the AMAA, the Raisin Marketing Order requires raisin handlers – those who process, pack, and ship raisins – to transfer title to a significant portion of raisins received from producers to the RAC, referred to as "reserved tonnage raisins."[2] *See* RAC, *Marketing Policy and Industry Statistics, 2010* 27 (Jan. 6, 2011), *available at* http://www.raisins.org/files/Marketing%20Policy%202010.pdf (last visited Feb. 27, 2015) ("Marketing Policy"). The percentage of a crop set aside as reserved tonnage raisins is set by the RAC in February of each crop year. 7 C.F.R. §§ 989.21, 989.54(d). The RAC then has complete control over the reserved tonnage raisins. It may sell the raisins to handlers for resale in export markets, *id.* at §§ 989.67(c), (e), or may sell or donate the raisins to foreign governments, United States governmental agencies, or charitable organizations. *Id.* at §§ 989.67(b)(2)-(4). The proceeds from these sales go to fund the RAC,

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[2] The raisins that handlers are allowed to keep are referred to as "free tonnage raisins," and may be sold on the open market. 7 C.F.R. § 989.65. Although the handlers bear the obligation to transfer the reserved tonnage raisins to the RAC, handlers pay producers only for free tonnage raisins and producers are thus uncompensated for the reserved tonnage raisins that are transferred to the RAC. *Id.* at §§ 989.65, 989.66(a). Petitioners produced at least some of the reserved tonnage raisins at issue, and were also determined to be "handlers" for purposes of the Raisin Marketing Order because they processed the raisins they produced. *See Horne v. U.S. Dept. of Agriculture*, 673 F.3d 1071, 1078 (9th Cir. 2011) ("*Horne I*"), *as amended on reconsideration* (Mar. 12, 2012), *rev'd sub nom. Horne v. Dep't of Agric.*, 133 S. Ct. 2053 (2013) ("*Horne*").

provide export subsidies to favored handlers, and, if anything is left over, distributed to producers on a *pro rata* basis. 7 U.S.C. § 608c(6)(E); 7 C.F.R. §§ 989.53(a), 989.66(h).

In the crop years at issue here, 2002-2003 and 2003-2004, the RAC required farmers to turn over 47 percent and 30 percent of their raisin crops, respectively. RAC, *Marketing Policy* at 27. In 2002-2003, the RAC remitted a small portion of the proceeds to producers, well below the cost of production, and not even close to fair market value. RAC, *Analysis Report* 22 (Aug. 1, 2006), *available at* http://www.raisins.org/analysis_report/analysis_report.pdf (last visited Feb. 27, 2015). In 2003-2004, the RAC remitted no portion of the proceeds to producers. *Id.* at 23, 55.

Petitioners, life-long raisin farmers, purchased equipment to sort, process, and pack their own raisins. *Horne*, 133 S. Ct. at 2058. They also allowed other farmers in the area to use their equipment for a per-ton fee. Petitioners did not believe they were subject to the "handler" requirements of the Raisin Marketing Order. *Id.* at 2059; Petition Appendix ("Pet. App.") at 132a-133a. On April 1, 2004, the USDA initiated an enforcement action against Petitioners for their failure to set aside reserved tonnage raisins in crop years 2002-2003 and 2003-2004, and assessed significant penalties. Pet. App. at 30a-31a; *Horne*, 133 S. Ct. at 2059; 7 U.S.C. §§ 608a(5), 608c(14); 7 C.F.R. § 989.166(c). These penalties consisted of both the dollar equivalent of the raisins' fair market value, $483,843.53, and $202,600 for failure to comply with

the reserve requirement.[3] Pet. App. at 98a, 122a. As this Court unanimously held in *Horne*, Petitioners properly raised a takings-based defense in the USDA's enforcement proceeding. 133 S. Ct. at 2064.

On remand from this Court's decision in *Horne*, the Ninth Circuit ruled on the merits of Petitioners' takings claim, determining that no taking had occurred. *Horne v. U.S. Dept. of Agriculture*, 750 F.3d 1128 (9th Cir. 2014) ("*Horne II*"). The Ninth Circuit determined that, because the government did not physically invade Petitioners' land and take their raisins, but merely required a transfer of title of those raisins under the Raisin Marketing Order, a physical takings analysis was inappropriate. *Id.* at 1138. The Ninth Circuit then applied a regulatory takings analysis, holding that personal property deserves less protection under the Takings Clause than real property because of "'the State's traditionally high degree of control over commercial dealings'" and "'the property owner necessarily expects the uses of his property to be restricted.'" *Id.* at 1139 (quoting *Lucas*, 505 U.S. at 1027-28). The panel then determined that no regulatory taking occurred because Petitioners received some benefit of regulation under the Raisin Marketing Order and retained a theoretical equitable stake in reserved tonnage raisins – they "did not lose

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[3] Petitioners were fined not only for the fair market value of the raisins they produced and sold, but the fair market value of the raisins of other farmers who had utilized Petitioners' equipment. Brief for Petitioners at 13.

all economically valuable use of their personal property." *Id.* at 1132, 1140-41. Using the "bundle of sticks" analogy of property rights, the panel determined that retention of any "'strand' from the 'bundle' of property rights" bars Petitioners from recovering for the taking of other strands. *Id.* at 1140 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982)). Petitioners again ask this Court to reverse.

SUMMARY OF ARGUMENT

The Ninth Circuit misconstrued both the history and the text of the Takings Clause, which has never been limited to real property. Property interests such as those at issue here have been protected from governmental interference since the founding of the Republic. Moreover, the Takings Clause has never contained a "reasonableness" component – the expectations of a property owner do not define the scope of his or her property rights. Even if the Ninth Circuit were correct in holding that a transfer of title does not effectuate a physical taking, the panel erred in focusing on the value of the interest retained by Petitioners, rather than the value of the property interest taken from them. The panel also erred in ruling that Petitioners are not entitled to compensation if they retained any "strand" in the "bundle" of property rights. Because the Ninth Circuit's decision has potentially devastating implications for private property owners and is wholly inconsistent with the history

and the text of the Takings Clause, this Court should reverse the panel's decision and hold that the Raisin Marketing Order effectuated a taking of Petitioners' property.

ARGUMENT

I. PROTECTION OF PERSONAL PROPERTY RIGHTS IS REQUIRED BY BOTH THE HISTORY AND THE TEXT OF THE TAKINGS CLAUSE.

The classes of property subject to protection under the Takings Clause of the Fifth Amendment cannot be defined without reference to the "historical compact" and legal texts underlying "our constitutional culture." *Lucas*, 505 U.S. at 1028. Long before the United States Constitution was drafted, the laws which laid the foundation for the Takings Clause protected personal property rights. Even at common law, personal property enjoyed the same protections – and sometimes greater protections – than real property. *See* Bridget C.E. Dooling, *Take It Past The Limit: Regulatory Takings Of Personal Property*, 16 Fed. Circuit B. J. 445, 453-54 (2007) ("In the feudal system . [a]lthough the king could make use of the land without compensation, he could not take personal property without compensating the owner . This deeply-rooted recognition of personal property as a protected private property interest, therefore, supports the inclusion of personal property in any definition of private property."). The Magna Carta, which

"provided roots for the U.S. Constitution[ ] and the Takings Clause in particular," *id.* at 454, protected "corn or other chattels of any man" from being taken without "pay[ment of] the purchase price within forty days." Nat'l Archives & Records Admin., Magna Carta Translation, art. 19, http://www.archives.gov/exhibits/featured_documents/magna_carta/translation.html (last visited Feb. 23, 2015). A provision of the 1641 Massachusetts Body of Liberties, one of the first colonial charters, also imposed a compensation requirement for the seizure of personal property:

> No mans Cattel or goods of what kinde soever shall be pressed or taken for any publique use or service, unlesse it be by warrant grounded upon some act of the general Court, nor without such reasonable prices and hire as the ordinarie rates of the Countrie do afford. And if his Cattle or goods shall perish or suffer damage in such service, the owner shall be suffitiently recompenced.

Massachusetts Body of Liberties § 8 (1641) (sic throughout), reprinted in *Sources of Our Liberties: Documentary Origins of Individual Liberties in the United States Constitution and Bill of Rights* 148-49 (Richard L. Perry & John C. Copper eds., 1952). "Both Maryland and Pennsylvania enacted similar provisions protecting owners from the loss of property except by due process." James W. Ely, *The Guardian of Every Other Right: A Constitutional History of Property* 13 (3d ed. 2008). The first state constitution to contain a just compensation requirement was the Vermont

Constitution of 1777, which declared that "'whenever any particular man's property is taken for the use of the public, the owner ought to receive an equivalent in money.'" William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 790 (1995) (quoting Vt. Const. of 1777, ch. 1, art. II).

While the Magna Carta and early colonies' protections of private property certainly shaped the Framers' conception of property rights, James Madison – who insisted on inclusion of the Takings Clause – understood property rights to be a function of natural law as well, originating in the "diversity in the faculties of men" for acquiring property. *Id.* at 783-84; The Federalist, No. 10, at 42 (James Madison) (Max Beloff ed., 2d ed. 1987); *see also* James Madison, Speech in the Virginia Constitutional Convention (Dec. 2, 1829), in James Madison, Writings (Jack N. Rakove ed. 1999) ("The personal right to acquire property, which is a natural right, gives to property, when acquired, a right to protection, as a social right.").[4] Other founders apparently shared this understanding. *See* 1 Papers of Thomas Jefferson 132 (Julian P. Boyd ed., 1950) (Natural or traditional rights of property exist independently of the state, "in the laws of nature."). The conception of property

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[4] Madison believed personal property was included in the classes of property deserving of protection. *See* The Papers of James Madison 266-68 (1983) ("Government is instituted to protect property of every sort," including "actual possessions. . . ").

ownership as a natural right is most commonly attributed to John Locke, who asserted that preservation of property was the "great and chief end" of government.[5] John Locke, *Two Treatises of Government* 368-69 (1690) (Peter Laslett ed., Cambridge Univ. Press 1967). This included, in Locke's view, personal property – an individual's right to "his labor and its fruits." Bret Boyce, *Property as a Natural Right and as a Conventional Right in Constitutional Law*, 29 Loy. L.A. Int'l & Comp. L. Rev. 201, 223 (2007). It is undisputed that Locke's philosophies were "critical" to the Framers' views of private property rights. *Id.* at 231; *see also* Jeffrey M. Gaba, *John Locke and the Meaning of the Takings Clause*, 72 Mo. L. Rev. 525, 579 (2007) (Locke "clearly influenced the founders" and his philosophies are "a legitimate part of the current debate over the relationship between government power and individual property

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[5] This Court has also long recognized the natural-law origins of the Takings Clause. *See Chicago, Burlington, & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 235-36 (1897) ("The requirement that the property shall not be taken for public use without just compensation is but 'an affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down as a principle of universal law. Indeed, in a free government, almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every cit[i]zen.'" (quoting 2 Story, Const. § 1790)); *Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. 166, 178 (1871) ("it seems to have been a settled principle of universal law that the right to compensation is an incident to the exercise of [the takings] power. . . .").

rights."). The Framers recognized that "principles of good government started with the protection of private property" and sought to avoid a world where "[s]tate bureaucrats could confiscate land at will" and "[g]overnment officials could harvest with impunity crops planted by ordinary citizens, and systemically disrupt all private efforts at long-term planning." Richard A. Epstein, *The Ebbs and Flows in Takings Law: Reflections on the Lake Tahoe Case*, 2002 Cato Sup. Ct. Rev. 5 (2002).

Not only does the history of the Takings Clause support inclusion of personal property in the classes of property protected by the Fifth Amendment, but the plain meaning of the text supports that interpretation as well. The text of the Takings Clause speaks generally of "private property," not specifically of real or personal property.[6] U.S. Const. amend. V. This

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[6] Significantly, the Fifth Amendment does not contain any limitations on the types of property protected thereunder, as does the Fourth Amendment, which was ratified at the same time. While the Takings Clause broadly protects "private property," the Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . " U.S. Const. amend. IV. These textual limitations have been used to explain that the Fourth Amendment's protections do not extend to "open fields" or other areas outside a home's "curtilage." *See Oliver v. United States*, 466 U.S. 170, 176-80 (1984). If the Framers intentionally limited the Fourth Amendment to "persons, houses, papers, and effects," it can be assumed that they could have similarly limited the Fifth Amendment to "real property" if that had been their intention. *See* Dooling, *Take it Past the Limit*, 16 Fed. Circuit B.J. at 457 ("The choice of the words *private property* suggests a

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Court has long recognized the word "property" in the Takings Clause "to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use, and dispose of it." *United States v. General Motors Corporation*, 323 U.S. 373, 378 (1945); *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 325 (1893) ("The language used in the [F]ifth [A]mendment is happily chosen. The entire amendment is a series of negations, denials of right or power in the government. ."). This group of property rights is protected by the Takings Clause in order "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Indeed, "[t]he Supreme Court has repeated this policy analysis in almost every Takings Clause case since 1960." Kenneth J. Sanney, *Balancing the Friction: How a Constitutional Challenge to Copyright Law Could Realign the Takings Clause of the Fifth Amendment*, 15 Colum. Sci. & Tech. L. Rev. 323, 342, 342 n.75 (2014) (collecting cases). The Takings Clause embodies the importance of providing legal protections to property, for without legal protections, property – unlike other rights protected by the Constitution – ceases to exist. As one commentator phrased it:

> [Property's] only substance is rights – that is, legal rights – and it does not exist, as a

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more inclusive category of property than that contemplated in the Fourth Amendment. . . ") (emphasis in original).

> coherent idea, apart from the idea of law and legal protection. Its essence is the protection of individuals' interests, and nothing more. It is the recognition and protection of individuals' rights in land; or rights in chattels; or rights in any identified source of wealth. That is all that it is. We can have speech that is not protected; we can have religion that is not protected; but we cannot have non-protected property. The only existence of or substance to the idea of property is the protection it affords; without this, the idea loses all meaning.

Laura S. Underkuffler, *Property and Change: The Constitutional Conundrum*, 91 Tex. L. Rev. 2015, 2030 (2013).

Moreover, the rationales underlying the Takings Clause apply equally to personal and real property. Without property rights, individuals have no "buffer protecting [them] from governmental coercion."[7] Ely, *The Guardian of Every Other Right* at 43 ("[I]n [the

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[7] Some of this Court's earliest cases regarding property rights recognized, without distinction between real and personal property, that property rights are necessary to guarantee liberty. *See Wilkinson v. Leland*, 27 U.S. 627, 657 (1829) ("The fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred."); *Monongahela Nav. Co.*, 148 U.S. at 324 ("[I]n any society the fullness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government.").

framers'] minds, property rights were indispensable because property ownership was closely associated with liberty. Arbitrary redistributions of property destroyed liberty, and thus the framers hoped to restrain attacks on property rights."). As is the case with real property, personal property "insulates owners from dependence on State largess. The possibility that a sovereign could deprive citizens of property without compensation would lead to their demoralization and lack of independence." Steven J. Eagle, *"Economic Impact" in Regulatory Takings Law*, 19 Hastings W.-N.W. J. Envtl. L. & Pol'y 407, 412 (2013). Additionally, as aptly demonstrated by the facts of this case, "both tangible and intangible personalty are as subject to condemnation as realty." Steven J. Eagle, *Regulatory Takings* 88 (2d ed. 2001). If the government is permitted to take both tangible and intangible property, it naturally follows that the government should pay for the value thereof in both instances. *Id.* at 90 ("[A] distinction between real and personal property for Takings Clause purposes [is] untenable [because] it raises the issue of how government might purport to control conduct deriving from the exercise of rights without respect to the constitutional regime protecting the rights themselves."); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 9 (1949) (Holding that the government may seize intangible property and "the intangible character of such value [does not] preclude[ ] compensation for it."); *see also City of Oakland v. Oakland Raiders*, 183 Cal. Rptr. 673, 677 (Cal. 1982) (Holding that football franchise was subject to condemnation while

recognizing that "[t]he constitutional provisions, both state and federal, make no verbal distinction between real property and personal property with respect to the requirement of 'just compensation.'").

This Court has continued to emphasize the "interdependence" between property and liberty since the Framers first recognized the connection: "[A] fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized." *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972) (citations omitted); *see also United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 61 (1993) ("Individual freedom finds tangible expression in property rights."). The history, language, and rationales behind the Takings Clause support the inclusion of personal property in the Clause's protection of "private property."

II. THE NINTH CIRCUIT ERRED IN GROUNDING ITS DISTINCTION BETWEEN PERSONAL PROPERTY AND REAL PROPERTY ON THE EXPECTATIONS OF PROPERTY OWNERS, RATHER THAN THE PROTECTIONS GRANTED BY THE TAKINGS CLAUSE.

Given the inviolability of private property rights, the Ninth Circuit erred in adopting a "reasonableness" analysis to determine whether a taking occurred. The panel determined that "the Takings Clause affords

less protection to personal than to real property" based on the reasonable expectations of the property owners – "'in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might even render his property economically worthless. '" *Horne II*, 750 F.3d at 1139 (quoting *Lucas*, 505 U.S. at 1027-28). The panel used *Lucas* to determine that "the government's authority to regulate such property without working a taking is at its apex" where personal property is concerned. *Id.* at 1139-40.

The Ninth Circuit's holding was in error. As scholar Richard Epstein has remarked,

> The notion of reasonable expectations is unrelated to any useful inquiry about the functions of the Takings Clause. . The only expectation that the Framers had when they drafted the Clause was that government would conform its behavior to the requirements of the Takings Clause. . . . There is no reason to allow a fictional gloss of reasonable expectations to take on a life of its own, where it will necessarily dilute the protection to private property that the constitutional text explicitly provides.

Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 Stan. L. Rev. 1369, 1377, 1386 (1993). Basing property rights on the property owner's expectations is, as Justice Kennedy has recognized, inherently circular, "for if

the owner's reasonable expectations are shaped by what courts allow as a proper exercise of governmental authority, property tends to become what courts say it is." *Lucas*, 505 U.S. at 1034 (Kennedy, J., concurring). In effect, the courts embark on a race to the bottom, until property owners have no reasonable expectations left.

In *Lucas*, Justice Kennedy stated that some circularity "must be tolerated" by analogizing to the reasonableness analysis of Fourth Amendment claims. *Id.* However, the Takings Clause is fundamentally different from the Fourth Amendment. "[P]rivate property [shall not] be taken for public use, without just compensation" does not contain a reasonableness component. *Compare* U.S. Const. amend. V *with* U.S. Const. amend. IV (protecting only against "*unreasonable* searches and seizures") (emphasis added). The Takings Clause "sets out what private property owners have the right to demand. The expectations of personal property owners are not a sufficient reason to deny what the Constitution grants." Dooling, *Take It Past the Limit*, 16 Fed. Circuit B.J. at 462; *see also id.* at 461-62 ("[A]lthough in Fourth Amendment analysis the right to privacy itself is subject to reasonableness, the prohibition contained in the Fifth Amendment Takings Clause is not cabined by reasonableness."); *Preseault v. United States*, 100 F.3d 1525, 1540 (Fed. Cir. 1996) ("The expectations of the individual, however well- or ill-founded, do not define for the law what are that individual's compensable property rights.").

The Ninth Circuit's application of a reasonableness analysis to a physical taking of Petitioners' personal property has significant implications for property rights generally. First, it creates uncertainty and favors an *ad hoc* approach over a useful analytic framework to interpreting the Takings Clause.[8] The panel effectively determined that no taking occurred because Petitioners' expectations that their personal property would not be taken were unreasonable, in light of the "less[er] protection" the panel deemed should be afforded to personal property and the government's "'traditionally high degree of control over commercial dealings.'" *Horne II*, 750 F.3d at 1139-40 (quoting *Lucas*, 505 U.S. at 1027-28). Such a holding provides no predictive value for other property owners, indeed; it sends the message that owners of personal property may be physically dispossessed of that property without recompense, so long as the government claims that the property owner should have expected to be so dispossessed. *Compare id. with Preseault*, 100 F.3d at 1540 (rejecting the government's contention "that an owner's subjective expectations of keeping or losing her property under various possible scenarios define for that owner the extent of her title" as "standing the law on its head") *and Palm Beach Isles Associates v. United States*, 231 F.3d 1354, 1357

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[8] Until the Ninth Circuit's decision, "'ad hoc, factual inquiries'" were the province of regulatory takings cases, not takings of physical title. *Lucas*, 505 U.S. at 1015 (quoting *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)).

(Fed. Cir. 2000) ("In a physical taking context, . . [q]uestions of whether the owner had reasonable investment-backed expectations at the time the property was first acquired are simply not part of the analysis.").

To make matters worse, the panel offered no justification for granting "less protection" to personal property than to real property, besides the government's desire to regulate it more intrusively. *Horne II*, 750 F.3d at 1139. As the Federal Circuit has recognized, even where personal property is highly regulated and such regulation serves a public purpose, a government's actions may still effectuate a taking of a compensable property interest. *Maritrans v. United States*, 342 F.3d 1344, 1353 (Fed. Cir. 2003); *see also* Eduardo Moisès Peñalver, *Is Land Special?* 31 Ecology L.Q. 227, 253 (2004) ("[O]wners' reasonable expectations, however conceived, [cannot] bear the weight" of a "categorical distinction between personal property and land.").

Second, a "reasonable expectations" test inappropriately transposes a regulatory takings analysis onto a physical taking. Only in the regulatory context has this Court ever referenced a property owner's expectations regarding the degree of governmental control exercised over his or her property. *See Lucas*, 505 U.S. at 1027-28. In *Lucas*, this Court explained, "our 'takings' jurisprudence has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain

title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time. . " *Id.* at 1027. The regulations the Court referenced in *Lucas* included denying a landowner "the requisite permit to engage in a landfilling operation that would have the effect of flooding others' land" or requiring the removal of "a nuclear generating plant upon discovery that the plant sits astride an earthquake fault." *Id.* at 1029. The Ninth Circuit takes *Lucas* entirely out of context and applies its rationale to physical takings. *Horne II*, 750 F.3d at 1139. While "government regulation – by definition – involves the adjustment of rights for the public good[,]" *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1979), such "adjustment of rights" has never been stretched to include transfers of physical title to property.[9] Whenever the government "physically takes possession of an interest in property" for a public purpose, it has a "categorical duty" to pay just compensation. *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012) (internal

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[9] Even in regulatory takings cases, it is inappropriate to hold, as the Ninth Circuit did, that *no* compensation is due merely because the property owner has chosen to participate in a regulated industry. *See Cienega Gardens v. United States*, 331 F.3d 1319, 1350 (Fed. Cir. 2003) ("The range of expectations that is reasonable may be reduced in proportion to the amount of regulation, but this is not a blanket rule that disqualifies parties' expectations without inquiry."); *Maritrans*, 342 F.3d at 1358-59 (rejecting the government's assertion that choosing to enter into a highly regulated industry renders any investment-backed expectations unreasonable).

quotations omitted); *see also Yee v. City of Escondido, Cal.*, 503 U.S. 519, 522 (1992) (When the government "actually takes title" to property, "the Takings Clause generally requires compensation."). The Ninth Circuit's analysis eviscerates the distinction between physical and regulatory takings by looking to Petitioners' reasonable expectations to hold that a transfer of title does not effectuate a taking.[10] Additionally, it unnecessarily introduces subjectivity to a straightforward physical takings inquiry in a manner unsupported by this Court's precedents.

III. THE NINTH CIRCUIT'S USE OF THE "BUNDLE OF STICKS" ANALOGY IS INAPPROPRIATE IN A PHYSICAL TAKINGS ANALYSIS AND ILL-FITTING TO A REGULATORY TAKINGS ANALYSIS.

A. The Ninth Circuit Erred In Holding That No Physical Taking Occurred Based On The "Bundle Of Sticks" Analogy.

In determining that Petitioners' personal property had not been taken by the Raisin Marketing Order, the Ninth Circuit used the age-old bundle of sticks analogy to hold that not *all* of Petitioners'

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[10] This Court has consistently recognized the importance of maintaining the "longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other. . . ." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 323 (2002).

property rights in the reserved raisins were terminated. *Horne II*, 750 F.3d at 1140 ("Unlike *Loretto*, which applies only when *each* 'strand from the bundle of property rights' is 'chop[ped] through . taking a slice of every strand,' the Hornes' rights with respect to the reserved raisins are not extinguished because the Hornes retain the right to the proceeds from their sale.") (quoting *Loretto*, 458 U.S. at 435) (internal citations and quotations omitted) (alterations and emphasis in original). The Ninth Circuit's analogy echoes the rationale of this Court's regulatory takings analysis in *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) ("*Allard*"): "At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." (quoting *Penn Central*, 438 U.S. at 130-31).

Loretto stands for the proposition that even a minor "permanent physical occupation" by the government constitutes a taking. 458 U.S. at 426. It is *not* restricted to "a total, permanent physical invasion of real property," as the Ninth Circuit claims. *Horne II*, 750 F.3d at 1139. A physical invasion of real property was the factual scenario before the Court in *Loretto*, but nowhere in the decision does this Court limit its holding to real property. In fact, the Court cited several decisions applying the physical takings test more broadly, including to regulations more attenuated from the strict real property context. *Loretto*, 458 U.S. at 430-33 (citing *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (regulation requiring

property owner to allow public access was a taking) *and United States v. Causby*, 328 U.S. 256 (1946) (government's frequent flights over plaintiff's land at low altitudes constituted a taking)).

Here, the Raisin Marketing Order required Petitioners to transfer title of a percentage of their raisin crop to the RAC, an agent of the USDA. 7 C.F.R. §§ 989.21, 989.54(d). For crop years 2002-2003 and 2003-2004, the Raisin Marketing Order required transfers of 47 percent and 30 percent of Petitioners' raisin crops, respectively. RAC, *Marketing Policy* at 27. The "right to proceeds" relied on by the panel is not a right to the fair market value of the raisins transferred, as required by this Court's takings cases. *See Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 10 (1984) ("'Just compensation,' we have held, means in most cases the fair market value of the property on the date it is appropriated." (citing *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511-13 (1979))). Instead, any "equitable right" retained by Petitioners to the reserved raisins was an amount well below the cost of production in crop year 2002-2003 (much less the fair market value), and was zero in crop year 2003-2004. RAC, *Analysis Report* at 23, 55. As in *Loretto*, the Raisin Marketing Order "chops through the bundle" of Petitioners' property rights in their crops, taking 47 percent of the 2002-2003 crop and 30 percent of the 2003-2004 crop. *See Loretto*, 458 U.S. at 435.

B. Even If The Ninth Circuit Were Correct In Applying A Regulatory Takings Analysis, The Taking Of One "Stick" In The Bundle Of Property Rights Still Results In The Taking Of A Compensable Property Interest.

As discussed above, the Ninth Circuit erred in holding that the entirety of Petitioners' rights in the reserved raisins were not taken. But even if the panel were correct in applying a regulatory takings analysis, it failed to explain how retention of a nearly worthless "equitable stake" in the reserved raisins prevented the Raisin Marketing Order from effectuating a taking.[11]

As an initial matter, this Court has "expressed discomfort with the logic" of applying the bundle of sticks analogy to justify taking one stick at a time, even in regulatory takings cases. *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001) (citing *Lucas*, 505 U.S. at 1016 n.7). In both *Palazzolo* and *Lucas*, this Court "avoid[ed] this difficulty" and declined to address the continued viability of a rule that a taking occurs only when a property owner is denied *all* reasonable use on his property. *Palazzolo*, 533 U.S. at 632; *Lucas*, 505 U.S. at 1016 n.7; *see also Penn Central*,

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[11] The Ninth Circuit also partially relied on the possible benefits of regulation to Petitioners. *Horne II*, 750 F.3d at 1141. Yet, generalized public benefits have no bearing on a property owner's right to just compensation. *See* Brief for Petitioners at 46-47.

438 U.S. at 149 n.13 (Justice Rehnquist recognizing that "[d]ifficult conceptual and legal problems are posed by a rule that a taking only occurs where the property owner is denied all reasonable return on his property") (Rehnquist, J., dissenting). In the case at bar, the Ninth Circuit suggests, in effect, "that the Constitution shields property owners when government grabs the entire 'bundle' but affords little or no protection when the government snatches one 'strand' at a time. " Richard G. Wilkins, *The Takings Clause: A Modern Plot for an Old Constitutional Tale*, 64 Notre Dame L. Rev. 1, 33-34 (1989). This conclusion makes little sense, because the Fifth Amendment protects not only the whole "bundle of sticks," but "embraces the component elements of the 'bundle.'" *Id.* at 34. Again, the text of the Takings Clause protects the entire "group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it." *General Motors Corp.*, 323 U.S. at 377-78. The Takings Clause "is addressed to every sort of interest the citizen may possess[,]" *id.* at 378, and a takings inquiry asks only whether one of these interests has been taken. *See American Pelagic Fishing Co., L.P. v. United States*, 379 F.3d 1363, 1376 (Fed. Cir. 2004) ("[O]ne of the sticks in the bundle of property rights that the owner of property acquires with his title must be proscribed in order for a taking to occur.").

Even if the Ninth Circuit were correct in concluding that the full value of Petitioners' reserved raisins was not taken by requiring a transfer of title to the

RAC, the panel was required to conduct some analysis – "to define the 'particular thing' whose value is to furnish the denominator of the fraction." Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1192 (1967) (describing the court's task of analyzing a regulation's economic impact on property as looking at a fraction, with the numerator being the value of the property with the regulation's restrictions and the denominator being the value absent those restrictions); *Tahoe-Sierra Preservation Council*, 535 U.S. at 332-33 (Answering "the 'denominator' question" by looking to "the metes and bounds that describe [the property's] geographic dimensions and the term of years that describes the temporal aspect of the owner's interest."). Here, the panel took no such pains. Rather than determine the value of the reserved raisins with and without the Raisin Marketing Order, the panel merely held that retaining some "equitable distribution" in the reserved raisins – even if that equitable interest "may be zero" – prevented the Raisin Marketing Order from effectuating a taking. *Horne II*, 750 F.3d at 1140.

The panel's holding suggests that a governmental entity may make an end run around the Takings Clause's just compensation requirement by providing some benefit, however *de minimis*, in return for seizure of a claimant's property. This conflicts with the basic premise of a Takings Clause inquiry. *See* Richard A. Epstein, *Takings: Private Property and the Power of*

Eminent Domain 62 (1985) ("The question to be asked is, 'What has been taken?' not 'What has been retained?'"); *General Motors Corp.*, 323 U.S. at 379 ("[T]he compensation to be paid is the value of the interest taken."). The minimal equitable interest maintained by Petitioners in exchange for the taking of a significant portion of their raisin crops hardly constitutes "compensation," much less "just compensation," because it fails to place them "in as good a position pecuniarily as if [their] property had not been taken[.]"[12] *Olson v. United States*, 292 U.S. 246, 255 (1934); *see also Monongahela Nav. Co.*, 148 U.S. at 326 (Just compensation "must be a full and perfect equivalent for the property taken. ").

Taken to its logical conclusion, the one-stick-at-a-time analysis can result – as it did in *Allard*, 444 U.S. at 51 – in the destruction of the entirety of a property's value without recompense. This approach is unnecessary when compared to the analysis of economic diminution in *Pennsylvania Coal*, 260 U.S. at 413-14. There, this Court considered a statute that forbade the mining of "certain coal" and determined that the regulatory burden placed upon this right was

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[12] While the Ninth Circuit declined to hold that raisin handlers were entitled to the fair market value of the reserved raisins taken under the Raisin Marketing Order, it did not bat an eyelash at the USDA's assessment of penalties against Petitioners in the amount of both the dollar equivalent of the raisins' fair market value, $483,843.53, and an additional $202,600 for failure to comply with the Raisin Marketing Order. Pet. App. 109a-110a.

sufficient to constitute a taking because it "has very nearly the same effect for constitutional purposes as appropriating or destroying it." *Id.* at 414-15. It was of no consequence that the government had taken only a single strand of the mine operators' bundles; the operators had "valuable, marketable interests in the minerals that were affected by the [statute]" and "Pennsylvania could not pluck identifiable, marketable 'strands' from their 'bundles' without compensation."[13] Wilkins, *The Takings Clause*, 64 Notre Dame L. Rev. at 35. This approach appropriately focuses on compensating the property owner for "the value of the interest taken."[14] *General Motors Corp.*, 323 U.S. at

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[13] This Court has repeatedly awarded compensation for deprivation of just one stick in the bundle. *See Kaiser Aetna*, 444 U.S. at 176 ("[T]he owner has . . lost one of the most essential sticks in the bundle of rights that are commonly characterized as property – the right to exclude others."); *Hodel v. Irving*, 481 U.S. 704, 716 (1987) (Where a regulation "amounts to virtually the abrogation of the right to pass on a certain type of property – the small undivided interest – to one's heirs[,]" the property owners were deprived of "'one of the most essential sticks in the bundle of rights. . . .'" (quoting *Kaiser Aetna*, 444 U.S. at 176)).

[14] Amicus curiae submit that in *Allard* this Court incorrectly focused on the "strands" retained by the property owners, rather than the value of the interest taken. *See* 444 U.S. at 66 ("In this case, it is crucial that appellees retain the right to possess and transport their property, and to donate or devise the protected birds."). So long as the Takings Clause protects against more than absolute appropriation, the focus of the economic diminution inquiry should be "whether the property owner has been deprived of a valuable, identifiable property interest. Loss of a single 'strand' is a real injury that raises constitutional concern." Wilkins, *The Takings Clause*, 64 Notre Dame L. Rev. at 45. The continued viability of *Allard* has been called into question by

(Continued on following page)

379; Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 Sup. Ct. Rev. 1, 18 (1987) ("So long as the use in question is part of the original bundle of property rights, then its loss is a partial taking of part of the property in question, one which presumptively requires compensation."). This approach does not "compel the government to regulate by purchase." *Allard*, 444 U.S. at 65 (emphasis omitted). Indeed, the Federal Circuit's approach has been to consider the value of the stick taken, rather than the value of the property rights retained, without dire consequences:

> The first step in our analysis then is to identify the subject of the alleged taking. In assessing whether or not a Fifth Amendment property interest exists, we look for crucial indicia of a property right, such as the ability to sell, assign, transfer or exclude. Stated differently, we determine whether the asserted

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members of this Court and by commentators. *See Hodel*, 481 U.S. at 719 ("[T]he present statute . . . is indistinguishable from the statute that was at issue in [*Allard*] . . . in finding a taking today our decision effectively limits *Allard* to its facts.") (Scalia, J., concurring); Steven I. Brody, *Rethinking Regulatory Takings: A View Toward a Comprehensive Analysis*, 8 N. Ill. U. L. Rev. 113, 131 (1987) ("Under a straight-forward reading of the fifth amendment just compensation clause, a property right cannot be effectively extinguished, as was done in [*Allard*], without making application of the amendment almost farcical."); Katheleen R. Guzman, *Give or Take an Acre: Property Norms and the Indian Land Consolidation Act*, 85 Iowa L. Rev. 595, 626 n.121 (2000) (Suggesting that *Allard* "either spoke precipitously or was wrongly decided after all.").

> property right is one of the sticks in the bundle of rights that inhered in ownership of the underlying *res*.

Hearts Bluff Game Ranch, Inc. v. United States, 669 F.3d 1326, 1330 (Fed. Cir. 2012) (internal citations and quotations omitted). To the extent that this Court's precedents have suggested straying from this fundamental principle of takings law, amicus curiae urge the Court to clarify that a takings analysis should always focus on the value of the interest taken.

CONCLUSION

For the foregoing reasons, the Court should reverse the Court of Appeals and hold that the USDA's enforcement of the Raisin Marketing Order effectuates a compensable taking of Petitioners' property.

Respectfully submitted,

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SUPREME COURT, U.S.
FILED
MAR 9 - 2015
OFFICE OF THE CLERK

No. 14-275

In the
Supreme Court of the United States

MARVIN D. HORNE, et al.,

Petitioners,

v.

UNITED STATES
DEPARTMENT OF AGRICULTURE,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS AND REVERSAL

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QUESTIONS PRESENTED

1. Whether the government's "categorical duty" under the Fifth Amendment to pay just compensation when it "physically takes possession of an interest in property," *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012), applies only to real property and not to personal property.

2. Whether the government may avoid the categorical duty to pay just compensation for a physical taking of property by reserving to the property owner a contingent interest in a portion of the value of the property, set at the government's discretion.

3. Whether a governmental mandate to relinquish specific, identifiable property as a "condition" on permission to engage in commerce effects a per se taking.

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INTEREST OF AMICUS CURIAE

Pursuant to Rule 37.3, Pacific Legal Foundation (PLF) respectfully files this amicus curiae brief in support of Petitioners Marvin D. Horne, et al.[1]

Founded in 1973, PLF is the nation's most experienced public interest legal organization defending Americans' property rights. PLF attorneys have often participated as lead counsel or amicus curiae in this Court in defense of the right of individuals to make reasonable use of their property, and to seek and obtain redress when that right is infringed. *See, e.g., Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511 (2012); *Sackett v. EPA*, 132 S. Ct. 1367 (2012); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997). More particularly, PLF attorneys served as lead counsel in the landmark case, *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), defining the scope of the government's authority to impose exactions on land use permits, and in the more recent case, *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013), affirming that the Takings Clause protects money, as well as real property, in land use permitting transactions. Both *Nollan* and *Koontz* are implicated

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

by the Ninth Circuit decision at issue here, and PLF believes that its familiarity with these cases—and constitutional takings law in general—will assist the Court in considering the federal takings issues in this case.

SUMMARY OF ARGUMENT

At its core, the lower court's decision in this case holds that the federal government did not take private property when it applied a "marketing order" (Order) requiring the Hornes to hand over a large portion of their raisin crop or a large part of their savings. In reaching this result, the Ninth Circuit concluded that the government's demands were judged under the "essential nexus" and "rough proportionality" exaction standards of *Nollan*, 483 U.S. at 837-39, and *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994), rather than the per se standard applicable to physical takings. *See Horne v. U.S. Dep't of Agric.*, 750 F.3d 1128, 1141-42 (9th Cir. 2014) (rejecting applicability of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982)). The lower court held that the Order satisfied the Takings Clause under the *Nollan/Dolan* tests because it reasonably advanced the government's regulatory goals. *Horne*, 750 F.3d at 1143-44.

This was incorrect. *Nollan* and *Dolan* do not apply to the taking presented in this case. In *Nollan*, this Court made clear that the "essential nexus" framework applies to a taking caused by a property use condition *only when* the government could lawfully deny the proposed property use outright. If the government could deny the use, then it could allow the use subject to some exaction condition that might otherwise be a taking—as long as the condition is appropriately tailored. But if the government could *not*

constitutionally deny the proposed use, then any exaction is reviewed under traditional takings standards as an independent burden on property rights.

This case reflects the latter principle. Here, unlike in *Nollan*, the Court cannot assume that the government could constitutionally ban the Hornes from the property use the government seeks to regulate —farming and sale of raisins, a beneficial, non-nuisance agricultural product. Multiple constitutional doctrines stand in the way of such an assumption. Therefore, the Order is not one of those property use conditions subject to *Nollan* and *Dolan*. Instead, it is an outright governmental demand to forfeit property, and should be adjudicated as such under a per se takings analysis. *Ark. Game & Fish Comm'n*, 133 S. Ct. at 518 ("'[W]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner.'" (quoting *Tahoe Sierra Preservation Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002))); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 3-4 (1949) (applying a per se analysis to seizure of a business). Indeed, to apply *Nollan* and *Dolan* here risks converting every regulation causing a physical appropriation of property into a mere "condition" on some activity whose constitutionality is determined by the *Nollan/Dolan* "nexus" and "rough proportionality" tests rather than the easily understood per se inquiry. The Court should not inject such confusion into takings law.

Finally, even if the Court found *Nollan* and *Dolan* relevant to this case despite the absence of the necessary predicates, the Ninth Circuit's

understanding of the "essential nexus" and "rough proportionality" tests is inadequate. *Nollan* and *Dolan* do not simply ask whether an exaction advances a particular government goal. They include an important causation element that requires the government to show that the regulated property use *directly causes* the problem an exaction addresses and, if so, that the exaction is proportionate to that impact. *Koontz*, 133 S. Ct. at 2591, 2595. The Ninth Circuit's reasoning did not include this essential analysis and should therefore not be followed.

ARGUMENT

I

NOLLAN/DOLAN GOVERN PROPERTY USE CONDITIONS ONLY WHEN THE GOVERNMENT COULD LEGITIMATELY FORBID THE REGULATED USE OUTRIGHT; SINCE THAT PREDICATE IS ABSENT HERE, *NOLLAN/DOLAN* DO NOT APPLY

The standards for determining whether an invasion of property rights violates the Constitution generally vary depending on whether it occurs through a physical or regulatory imposition. Government actions tantamount to a physical invasion or occupation, like those that take possession of private property, are subject to a strict, per se test that automatically requires the government to pay just compensation. Regulatory restrictions on property that deny a property owner all economically beneficial use of property are also subject to a per se test. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017-19 (1992). Lesser regulatory impositions are

subject to the multi-factor test of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978).

Then there is a third category of tests that are not, strictly speaking, takings standards at all, but a "special application of the 'doctrine of 'unconstitutional conditions.' " *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547 (2005) (quoting *Dolan*, 512 U.S. at 385). Articulated in *Nollan* and *Dolan*, these tests govern in place of traditional takings tests in certain cases where the government exacts property interests as a condition of property use. The Ninth Circuit utilized the *Nollan/Dolan* tests to resolve this case, but it was wrong.

A. The *Nollan* and *Dolan* Tests Have Limited Applicability

1. The Basics of *Nollan* and *Dolan*

In *Nollan*, property owners sought a permit to build a beach home. 483 U.S. at 828. When the Coastal Commission demanded that they dedicate an easement across their beach front yard to the public to obtain approval, the Nollans challenged the condition as a taking. This Court held the condition unconstitutional because there was an insufficient connection between the condition and any negative social impact arising from the Nollans' house. *Id.* at 837-39. Without this "essential nexus," the permit condition was "quite simply, the obtaining of an easement without payment of compensation." *Id.* at 837. *Nollan* thus established that, in some cases, a taking arising from a property use condition is unconstitutional without a clear link between the condition and the impacts of the property.

In *Dolan*, this Court considered how close a fit there must be between a permit exaction and the potential negative impacts of the regulated property. The case involved exactions imposed on Florence Dolan's plan to expand her plumbing and electrical supply store. The government specifically demanded easements for a storm drainage system and public pathway as a condition of approving the expansion. 512 U.S. at 379-80. Although these exactions satisfied *Nollan*—because the easements mitigated the effects of the enlarged store in potentially causing increased flooding and traffic—the *Dolan* Court held that such a connection alone was insufficient to constitutionalize the conditions. *Id.* at 391. The Fifth Amendment also required the government to make an individualized determination showing the exactions are "roughly proportionate" to the impact of the property owner's proposed development. *Id.* The City failed to do so in *Dolan*.

Thus, the rule arising from the *Nollan* and *Dolan* decisions is that the government may "condition approval of a permit on the dedication of property to the public so long as there is a 'nexus' and 'rough proportionality' between the property that the government demands and the social costs of the applicant's proposal." *Koontz*, 133 S. Ct. at 2595. The Court has repeatedly made clear that these are land use condition tests, not general takings standards. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999) ("[W]e have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use."). This does not mean, however, that *every* condition that seeks to exact property is a

Nollan/Dolan issue. Certain predicates must exist before the "nexus" and "rough proportionality" tests control over traditional standards like the per se physical takings test.

2. *Nollan/Dolan* Apply to a Taking Arising from a Property Use "Condition" Only When the Government Could Deny the Regulated Use Outright

To understand the limits of the *Nollan/Dolan* framework, it is necessary to more closely review the property restriction at issue in *Nollan*—a public access easement. Although the *Nollan* Court recognized that a taking of such an encumbrance is typically a per se physical taking,[2] it analyzed the encumbrance under the "essential nexus" test, rather than the strict, categorical test. Casual readers may conclude this was because the easement exaction in *Nollan* was imposed as a permit condition rather than as a straightforward seizure. But this is too facile. The Court's refusal to treat the easement demanded from the Nollans as a textbook physical taking rests on a different, deeper predicate.

That predicate is the assumption that the Commission could constitutionally deny the Nollans' home outright if it interfered with the agency's presumably legitimate public beach access goals.[3] It is

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[2] *See* 483 U.S. at 831 (citing *Loretto*, 458 U.S. at 433, *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)).

[3] The *Nollan* Court could apparently assume that the Commission's outright denial of the proposed home would not cause a taking because there was already a pre-existing, smaller

(continued...)

this premise that led the Court to conclude that "a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking" under traditional tests, "*if the refusal to issue the permit would not constitute a taking.*" 483 U.S. at 835-36 (emphasis added). In other words, a use condition that takes property for a legitimate purpose is not analyzed under normal takings rules *if* the condition allows a use that could be legitimately denied for the same purpose. *Id.* at 836-37.

The Court explained this principle by considering several hypothetical conditions that might have been imposed on the Nollans to advance public beach access goals, including "a [public] viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere." *Id.* at 836. Like an easement, such a viewing spot would normally be considered a per se physical taking, but that character disappeared if the Commission could deny the Nollans' proposed home:

> Although such a requirement, constituting a permanent grant of continuous access to the property, would have to be considered a taking if it were not attached to a development permit, the Commission's *assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession*

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[3] (...continued)
home on the Nollans' lot, with which denial would not have interfered.

> *by the owner, even a concession of property rights, that serves the same end.*

Id. (emphasis added).

Nollan went on to hold that constitutional limits remain even in this outright denial context. Specifically, while the per se test may not apply, an exaction must still be tailored to the social impacts caused by the subject property—there must be an "essential nexus." *Id.* at 837.

The bottom line is that *Nollan* articulated the "essential nexus" test only for some property exactions—those imposed to authorize property uses that could be otherwise completely denied. *Id.* If this predicate is missing, standard takings tests will apply even to a condition that seeks to exact private property. *Id.*; *see also*, Frank Michelman, *Takings, 1987*, 88 Colum. L. Rev. 1600, 1610-12 (1988) (explaining that the difference between the per se test applied to the physical taking in *Loretto* and the "essential nexus" test applied to that in *Nollan* is that in *Loretto*, it would have been a taking for the government to totally deny the regulated property use-rental of the building).

B. The Physical Takings Imposed by the Marketing Order Are Not Subject to *Nollan* and *Dolan*

In this case, the Ninth Circuit applied *Nollan* and *Dolan* after reaching the questionable conclusion that the Order functions as a condition on the Hornes' right to produce and sell raisins. *Horne*, 750 F.3d at 1143. Even taking this conclusion at face value, it fails to justify application of *Nollan* and *Dolan* because it skips over the critical question of whether the government

could prohibit the Hornes' activities altogether. The logic also fails because it threatens to convert every physical taking suffered in the course of a legitimate business into a "condition" that is immune from the per se standard.

1. *Nollan* and *Dolan* Do Not Apply Here Because One Cannot Assume the Government Could Constitutionally Terminate the Hornes' Raisin Business

In this case, the government cannot and has not shown that it could legitimately prohibit the Hornes' business activities—the activities which the Order allegedly "conditions." 483 U.S. at 836-37. The Takings Clause[4] and Equal Protection Clause[5] would constrain the government's ability to order the Hornes to cease selling raisins, thereby destroying their business and the productive use of their land, to fix a raisin supply problem. *See id.* at 835 n.4 ("If the Nollans were being singled out to bear the burden of California's attempt to remedy [beach access problems], although they had not contributed to it more than other coastal landowners, the State's action,

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[4] *See Lucas*, 505 U.S. at 1017-19 (regulations depriving a property owner of economic use of property are unconstitutional without just compensation); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 744-45 (1950) (government activities that took away property rights in water historically used for cattle grazing caused a taking).

[5] *See Village of Willowbrook v. Olech*, 528 U.S. 562, 564-65 (2000) (A "class of one" equal protection violation arises where the government "intentionally treated [a property owner] differently from others similarly situated and that there is no rational basis for the difference in treatment.").

even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause."). At the least, unlike in *Nollan*, there is no basis for the Court to assume that the government could constitutionally terminate the Hornes' business, and that the "essential nexus" test controls for that reason. This is particularly so where the government has never argued it has constitutional power to close the Hornes' business, and no lower court has addressed the issue.

Consequently, the fundamental predicate for the application of the "essential nexus" inquiry does not exist here. This means that the exaction of property from the Hornes must be reviewed on its own terms under the default takings framework. *See, e.g.*, *Loretto*, 458 U.S. at 438-39 (considering whether a regulation requiring installation of a cable box for tenant use was a taking without respect to the property owner's rental of the property). That is, the fact that the government's demand for the Hornes' property occurs in connection with their desire to sell produce is immaterial in terms of the standards to be applied. The Order is not a set of "conditions" within the purview of *Nollan* and *Dolan*, but simply a mandate to transfer the Hornes' property to the government. Such a taking has always been analyzed for constitutionality under this Court's physical takings precedents.

2. The Ninth Circuit's Rationale Would Wrongly Turn Every Physical Taking Into a "Condition" Reviewed Under *Nollan* and *Dolan* Rather Than the Traditional Per Se Test

The Ninth Circuit's treatment of the Order as a "condition" on the Hornes' desire to sell raisins—one that triggers *Nollan*—is not only wrong because it is inconsistent with *Nollan*, but also because this logic would eviscerate physical takings jurisprudence. Consider *Loretto*, the seminal physical takings case. There, the government authorized attachment of a cable box to Ms. Loretto's apartment building. This Court had little trouble finding this to be a per se taking. 458 U.S. at 435-38. But under the Ninth Circuit's reasoning, the same imposition would likely be cast as a mere "condition" on Ms. Loretto's "choice" to rent property. *Horne*, 750 F.3d at 1143. As such, it would be weighed under the less demanding *Nollan/Dolan* tests. *Id.*

The same analytical transformation is possible in every physical takings case this Court has considered. In *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003), the Court held the taking of interest on client funds to be a per se physical taking. *Id.* at 235. In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), the Court held the taking of interest on court-deposited funds to be per se unconstitutional. *Id.* at 164. Under the Ninth Circuit's rationale, both of these takings would be treated a condition on use of the legal system—one that is subject to the essential nexus and proportionality tests, rather than physical takings law. The taking of a public easement in *Kaiser*

Aetna? It would be a "condition" on the election to build near federal waters and treated as a *Nollan* issue rather than as a per se taking of the right to exclude strangers.[6]

Thus, taken to its logical conclusion, the Ninth Circuit's decision to treat the Order in this case as a "condition"subject to *Nollan* and *Dolan* rather than as a physical taking would render this Court's per se, physical takings framework a nullity. This cannot be correct.[7] *Nollan* and *Dolan* do not override established takings tests in this case just because the taking of the Hornes' property can be creatively cast as a condition on their choice to engage in a regulated business activity.

This case thus boils down to the relatively simple question of whether the requirements of the Order—standing alone—fail traditional takings tests. This Court's physical takings jurisprudence clearly says "yes." The appropriation of personal property is a physical, per se taking. *Kimball Laundry*, 338 U.S. at 7. So is the confiscation of money when it is connected to an identifiable property interest—like the Hornes' raisin business and/or their farmed land. *Koontz*, 133 S. Ct. at 2599. Therefore, with the Ninth Circuit's use of *Nollan* and *Dolan* properly out of the

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[6] *See Kaiser Aetna*, 444 U.S. at 180-81.

[7] Indeed, in *Loretto*, the Court faced the characterization of the physical taking in that case as a "condition" on the rental use of property, an argument intended to provoke a more lenient takings standard. *See Loretto*, 458 U.S. at 438-39. Yet, the Court rejected this argument and applied a per se takings analysis. *Id.* at 439 & n.17.

equation, it is clear that the Order unconstitutionally takes the Hornes' property.

II

WHEN APPLICABLE, *NOLLAN* AND *DOLAN* REQUIRE THE GOVERNMENT TO SHOW THAT THE REGULATED PROPERTY USE DIRECTLY CAUSES THE NEED FOR THE PARTICULAR TYPE AND DEGREE OF EXACTION IMPOSED

Nollan and *Dolan* do not apply here. But it is important to recognize that the Ninth Circuit not only failed to ascertain the limited reach of *Nollan* and *Dolan*, it also badly misunderstood the nature of the "essential nexus" and "rough proportionality" inquiry. The lower court applied that inquiry as if it only tests whether a purported property use condition serves the government's regulatory ends. *Horne*, 750 F.3d at 1143-44. This is not a proper interpretation. Indeed, it leaves out the most unique—and often dispositive—aspect of *Nollan* and *Dolan*.

It only takes a cursory reading of the decision below to see that the Ninth Circuit views *Nollan* and *Dolan* as requiring nothing more than a means-ends analysis. *See, e.g.*, *Horne*, 750 F.3d at 1143 ("We now turn to the nexus requirement and ask if the reserve program 'further[s] the end advanced as [its] justification.'" (quoting *Nollan*, 483 U.S. at 837)); *id.* at 1144 ("There is a sufficient nexus between the means and the ends of the Marketing Order. The structure of the reserve requirement is at least roughly proportional . to Congress's stated goal of ensuring an orderly domestic raising market."). Under the

Ninth Circuit's view, as long as the exaction at issue (the requirement to dedicate raisins) furthers the government's purpose in imposing the exaction (an "orderly domestic raisin market"), *Nollan* and *Dolan* are satisfied. *Id.*

But the "essential nexus" and "rough proportionality" tests have never simply been a rational basis test by another name. As *Koontz* explains, under *Nollan/Dolan*, the government may "condition approval of a permit on the dedication of property to the public so long as there is a 'nexus' and 'rough proportionality' between *the property that the government demands and the social costs of the applicant's proposal.*" 133 S. Ct. at 2595 (emphasis added). The core of the "essential nexus" test is not whether an exaction serves a legitimate government goal, but whether the regulated property use *causes* the problem an exaction mitigates.[8] *Id.*; *see also*

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[8] Commentators have long recognized the role of causation in the *Nollan/Dolan* tests. *See* Timothy M. Mulvaney, *Proposed Exactions*, 26 J. Land Use & Envtl. L. 277, 281 (2011) (In *Nollan*, "the state did not meet its burden of proving that a condition requiring a beach access pathway bore an 'essential nexus' to the impacts caused by the development."); Pierson Andrews, *Nollan and Dolan: Providing a Roadmap for Adopting a Uniform System to Determine Transportation Impact Fees*, 25 BYU J. Pub. L. 143, 146 (2011) ("In *Nollan*, the United States Supreme Court concentrated on the connection between the exaction required by the government and the burden imposed by the new development."); J. David Breemer, *The Evolution of the "Essential Nexus": How State and Federal Courts Have Applied Nollan and Dolan and Where They Should Go from Here*, 59 Wash. & Lee L. Rev. 373, 378 (2002) ("*Nollan* established that an 'essential nexus' must exist between a development condition and the amelioration of a legitimate public problem arising from the development."); James E. Holloway & Donald C. Guy, *Land*

(continued...)

Pennell v. City of San Jose, 485 U.S. 1, 20 (1988) (Scalia, J., concurring in part and dissenting in part) (traditional land use regulation is valid because there exists "a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy"). *Dolan* confirms this by requiring the government to show that the regulated property use also causes the need for the type and *degree* of exaction. *Dolan*, 512 U.S. at 391 (government "must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development").

The Court struck down the beach easement in *Nollan* because the Commission failed to show it would "remedy any additional congestion on [the beach] *caused by construction* of the Nollans' new house." 483 U.S. at 838-39 (emphasis added). Similarly, the *Dolan* Court struck down the floodway easement imposed on Ms. Dolan because the expansion of her hardware store—and its potential to increase water runoff in a flood plain area—did not cause a need for public

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[8] (...continued)
Dedication Conditions and Beyond the Essential Nexus: Determining "Reasonably Related" Impacts of Real Estate Development Under the Takings Clause, 27 Tex. Tech L. Rev. 73, 96 (1996) ("*Nollan*'s essential nexus test requires the government to establish a more direct, causal connection between land dedication conditions and the impact of real estate development"); Brian T. Hodges & Daniel A. Himebaugh, *Have Washington Courts Lost Essential Nexus to the Precautionary Principle? Citizens' Alliance for Property Rights v. Sims*, 40 Envtl. L. 829, 829 (2010) ("The essential nexus test requires the government to establish a cause-and-effect connection between development and an identified public problem before placing conditions on development.").

ownership of the easement area. 512 U.S. at 394-95 ("[T]he findings upon which the city relies do not show the required reasonable relationship [rough proportionality] between the floodplain easement and the petitioner's proposed new building."); *id.* at 393 ("But the city demanded more [than an open space restriction to address run-off concerns]—it not only wanted petitioner not to build in the floodplain, but it also wanted petitioner's property along Fanno Creek for its greenway system.").

Here, however, the Ninth Circuit's version of *Nollan* and *Dolan* totally fails to ask whether there is a direct and proportionate link between the regulated property use and exaction. *Horne*, 750 F.3d at 1143 ("By reserving a dynamic percentage of raisins annually such that the domestic raisin supply remains relatively constant, the Marketing Order program furthers the end advanced: obtaining orderly market conditions."). If *Nollan* and *Dolan* were applicable here (they are not), the Ninth Circuit would have to ask whether (1) the Hornes' business caused the problem the confiscation of their raisins is supposed to mitigate, and if so, (2) whether the government has made an individualized determination that the raisin exaction is roughly proportionate in nature and degree (amount) to the social problem allegedly arising from the Hornes' activities. *Koontz*, 133 S. Ct. at 2595.

In bypassing this analysis, the Ninth Circuit converted *Nollan* and *Dolan* from a robust, cause-and-effect standard into a weak due process-type test. There is no basis for this in the Court's precedent. In fact, this Court has already rejected such a construction. *Dolan*, 512 U.S. at 391. Therefore, in clarifying that *Nollan* and *Dolan* do not apply here, the

Court should also repudiate the Ninth Circuit's understanding of the *Nollan/Dolan* tests, lest other lower courts follow it.[9]

CONCLUSION

The Court should reverse the Ninth Circuit's decision.

DATED: March, 2015.

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[9] Amicus declines to engage in a complete analysis of this case under a correct version of the "essential nexus" and "rough proportionality" tests because *Nollan* and *Dolan* simply do not control. However, Amicus notes that the government never made an "individualized determination" that the amount and type of property taken from the Hornes is proportional to their particular impact on the raisin market, *Dolan*, 512 U.S. at 391, nor did it establish this point in proceedings below.

No. 14-275

Supreme Court, U.S.
FILED
MAR 9 2015
OFFICE OF THE CLERK

In The Supreme Court of the United States

MARVIN D. HORNE, *ET AL.*,

Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE RUTHERFORD INSTITUTE, *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

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QUESTIONS PRESENTED

(1) Whether the government's "categorical duty" under the Fifth Amendment to pay just compensation when it "physically takes possession of an interest in property," *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012), applies only to real property and not to personal property.

(2) Whether the government may avoid the categorical duty to pay just compensation for a physical taking of property by reserving to the property owner a contingent interest in a portion of the value of the property, set at the government's discretion.

(3) Whether a governmental mandate to relinquish specific, identifiable property as a "condition" on permission to engage in commerce effects a per se taking.

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INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. Attorneys affiliated with the Institute have filed *amicus curiae* briefs in this Court on numerous occasions over the Institute's 30-year history, including *Snyder v. Phelps*, 131 S. Ct. 1207 (2011)[2], and *Safford Uniform School District No. 1 v. Redding*, 557 U.S. 364 (2009). One of the purposes of the Institute is to advance the preservation of the most basic freedoms our nation affords its citizens – in this case, the right to be free from uncompensated deprivations of personal property.

SUMMARY OF THE ARGUMENT

Reduced to its core, the issue that confronts this Court is simple: may this country's citizens be dispossessed of their private property by the

---

[1] Pursuant to Sup. Ct. R. 37.6, *amicus* certifies that no counsel for a party to this action authored any part of this *amicus curiae* brief, nor did any party or counsel to any party make any monetary contribution to fund the preparation or submission of this brief. Counsel of record for the parties to this action have filed letters with this Court consenting to the filing of *amicus curiae* briefs.

[2] *See Snyder*, 131 S. Ct. at 1213 (citing Brief for The Rutherford Institute as *Amicus Curiae*).

government without just (or, indeed, any) compensation?

Here, the basis for the taking of Petitioners' personal property without just compensation is a faulty premise that an individual's personal property is less sacrosanct than real property and is not subject to the protections of the Fifth Amendment's Takings Clause. Because there is no historical or principled basis for such a distinction between real and personal property, however, the Court should hold that both types of property are protected equally under the Takings Clause. To fail to do so would eviscerate the right of our nation's citizens to be secure in their possessions.

ARGUMENT

I. The History of the Fifth Amendment Demonstrates that the Takings Clause Should be Applied to Personal, as Well as Real, Property.

In pertinent part, the Fifth Amendment provides that "[n]or shall private property be taken for public use, without just compensation." U.S. CONST., amend. V. A principal purpose of the Takings Clause is "to bar the Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Accordingly, it is well-established that "[t]he takings clause is the most important protection of property rights in the Constitution." ERWIN CHEMERINSKY,

CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 616 (2d ed. 2002).

Despite the importance of property rights in the Anglo-American legal tradition, uncompensated takings were frequent in the revolutionary era. Significantly, these takings were not just of land, but also included takings of personal property for military use. *See, e.g.*, *Respublica v. Sparhawk*, 1 Dall. 357 (Pa. 1788) (denying compensation for seizure of goods). The following account of John Jay illustrates the resentment against government appropriation of private property to supply the army during the Revolutionary War, and demonstrates the Founders' commitment to the protection of personal property:

> I . take the Liberty of calling the Attention of my Countrymen to a Subject, which however important seems to have passed without due Notice; I mean the Practice of impressing Horses, Teems, and Carriages by the military . . without any Authority from the Law of the Land.
>
> * * *
>
> . . . The Time may come when Law and Justice will again pervade the State, and many who now severely feel this kind of oppression, may then bring Actions and recover Damages. This is true Doctrine, however questionable the Policy of declaring it at this Time may be.

John Jay, *A Hint to the Legislature of the State of New York* (1778), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 312, 312-13 (Philip B. Kurland & Ralph Lerner eds., 1987).

Against a background of such abuses, the Takings Clause was designed to protect both real and personal property, and reflected the liberalism of its primary author, James Madison. Along with the rest of the Fifth Amendment, the Takings Clause became effective on December 15, 1791, and its significance is illustrated by the fact that it was the first provision of the Bill of Rights to be applied to the states. *See Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226 (1897). Professor Treanor notes that "Madison's rationale for the Bill of Rights suggests two reasons for his proposal of the just compensation clause. First, the clause would explicitly bar the uncompensated taking by the national government of ***chattel*** and real property . . . ." William M. Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 710-11 (1985) (emphasis added). Similarly, Professor Rubenfeld argues that "the appropriation of private, and, presumably, personal, property to supply the army during the Revolutionary War" numbered among the "paradigm[atic] case[s]" of governmental wrongdoing that the Founders sought to remedy through the Takings Clause. Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1122-23 (1993).

Such an understanding is in harmony with Madison's own writings. In his essay *Property*, Madison argued that the federal government had committed to the proposition that "no land or merchandize" "shall be taken *directly* even for public

use without indemnification to the owner." *Property*, Nat'l Gazette, Mar. 27, 1792, in 14 J. MADISON, THE PAPERS OF JAMES MADISON 266-67 (R. Rutland & T. Mason eds. 1983). Likewise, Henry St. George Tucker, writing shortly after the ratification of the Takings Clause, stated that the purpose of the clause was "probably intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by Impressment, as was too frequently practiced during the revolutionary war, without any compensation whatsoever." 1 HENRY ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES 305-06 (The Lawbook Exchange, Inc. 2008).

Not only does this undercut any argument that real property is somehow more deserving of protection under the Takings Clause, but it seems likely that the Founders were more concerned with the taking of personal property by troops than the taking of real property by the government. Indeed, as Professor Peñalver has concluded, "it seems unlikely that the uncompensated taking of personal property was somehow less offensive to the Framers than the uncompensated taking of land." Eduardo M. Peñalver, *Is Land Special? The Unjustified Preference for Landownership in Regulatory Takings Law*, 31 ECOLOGY L.Q. 227, 249 (2004).

In this respect, the Takings Clause is in harmony with its English antecedents, specifically Magna Carta. As Professor Rubenfeld explains, "the Compensation Clause is also a descendant of Magna Carta, which provided that the King could not 'take grain or other chattels or any one without immediate payment therefore in money.'" Rubenfeld, *Usings*, 102 YALE L.J. at 1123 n.205 (citing Magna Carta ch.

28, *reprinted in* 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 8, 11 (1971)). Such an understanding chimes with the commentaries of William Blackstone, who defined property rights as consisting of "the free use, enjoyment, and disposal of all his acquisitions, without any control of diminution, save only by the laws of the land." 1 WILLIAM BLACKSTONE, COMMENTARIES 134.

Put simply, therefore, "the original understanding of the Takings Clause offers no support for a distinction between personal property and land in takings law." Peñalver, *Is Land Special?*, 31 ECOLOGY L.Q. at 250. As such, any reading of the Takings Clause that allows an individual's personal property to be subject to uncompensated takings is an affront to its original understanding and purpose.

II. There is No Principled Reason to Limit the Takings Clause to Real Property.

Despite the historical support that the Takings Clause was designed to protect personal property, courts have frequently afforded real property far more protection than personal property. Such decisions, however, cut against this Court's earliest Takings Clause precedent. In *United States v. Russell*, 80 U.S. 623 (1871), the Court held that the federal government was obliged to pay compensation for steamships confiscated as part of the Civil War effort. *Id.* at 630 ("Beyond doubt such an obligation raises an implied promise on the part of the United States to reimburse the owner for the use of the steamboats . . . ."). By way of further

illustration and more recently, in *United States v. General Motors Corp.*, 323 U.S. 373 (1945), the Court stated that "property" as used in the Takings Clause refers to the entire "group of rights inhering in the citizen's [ownership]" and was not limited to the "vulgar and untechnical sense of the physical thing with respect to which the citizen exercises right recognized by law. [Instead it] . . . denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. . . . The constitutional provision is addressed to every sort of interest the citizen may possess." *Id.* at 378. Even more recently, the Court has determined that forms of property other than tangible property are protected under the Takings Clause. *See, e.g.*, *Ruckleshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (holding that trade secrets are property).

Here, Petitioners' property interest in the raisins they sell to support themselves is at least as great as the other forms of property that this Court and various Courts of Appeal have held are protected under the Takings Clause. *See, e.g.*, *Brown v. Legal Found. Of Wash.*, 538 U.S. 216 (2003) (relating to interest from IOLTA accounts); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) (relating to interest earned on an interpleader fund); *Schneider v. Cal. Dep't of Corr.*, 151 F.3d 1194 (9th Cir. 1998) (relating to interest from inmate funds placed in trust); *Nixon v. United States*, 978 F.2d 1269 (D.C. Cir. 1992) (holding that "taking" of presidential papers requires just compensation). Consequently, the "implication the 'personal property' should have less protection than land under regulatory takings doctrine flies in the

face of long precedent that both tangible and intangible personalty are as subject to condemnation as realty." STEVEN J. EAGLE, REGULATORY TAKINGS 88 (2d ed. 2001). Professor Peñalver likewise concludes that "the distinction finds no support in the plain text of the Constitution. The Fifth Amendment protects 'private property,' but does not distinguish between personal property and land." Peñalver, *Is Land Special?*, 31 ECOLOGY L.Q. at 246.

Indeed, properly read, any reading of the Takings Clause must, by definition, include the personal property of Petitioners. The Framers could have limited the word "property" to real property when drafting the Fifth Amendment but did not do so. Consequently, "[t]he term 'property,' when used in its most comprehensive sense, will include both real and personal property, unless restricted in its meaning by the context.'" THOMPSON ON REAL PROPERTY § 14.03, at 184 (David A. Thomas ed., Supp. 1999). Such an understanding is far from remarkable, as demonstrated by the Black's Law dictionary definition: "That which is peculiar or proper to any person; that which belongs exclusively to one." It includes "everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value or which foes to make up wealth or estate." BLACK'S LAW DICTIONARY 1216 (6th ed. 1990) (defining "property"). Without any limiting adjective, therefore, the use of the term "property" in the Takings Clause should be read expansively to include personal property.

Perhaps the justification for the differential treatment of real and personal property is based on

outdated concepts of the significance of real property. *See, e.g.*, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992) ("[T]he 'interest in land' that Lucas has pleaded (a fee simple interest) is an estate with a rich tradition of protection at common law . . . ."). Whatever the merits of this, "[i]t is important . . . to keep in mind that [the distinction between land and personal property is] traceable to conditions no longer existing in England, and which never had any existence in this country." THOMPSON ON REAL PROPERTY § 14.03, at 182. As such, "[t]o the extent that this conclusion conflicts with vague intuitions about the primacy of property in land, those intuitions are most likely rooted in cultural assumptions based on outmoded notions of the ways in which most people use land." Peñalver, *Is Land Special?*, 31 ECOLOGY L.Q. at 286.

III. Petitioners Are Entitled to Just Compensation.

Once it is established that the taking of Petitioners' personal property is fully protected under the Takings Clause, just compensation must follow. This Court has recognized that "[i]t is axiomatic that the Fifth Amendment's just compensation provision is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *First English Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318-19 (1987) (quoting *Armstrong*, 364 U.S. at 49). This is measured by the market value to Petitioners at the time of the takings. *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1 (1984); *see also Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910) (measure of compensation is

"what has the owner lost, not what has the taker gained.") (Holmes, J.). Only by doing so can there be "an affirmance of a great doctrine established by the common law for the protection of private property." 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 661 (Cambridge, Mass. 1833).

CONCLUSION

The history and original purpose of the Takings Clause, as well as modern concepts and expectations of property rights, compels the conclusion that the clause properly extends to Petitioners' personal property. As such, for the reasons set forth above, this Court should reverse the decision of the United States Court of Appeals for the Ninth Circuit.

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Supreme Court, U.S.
FILED
APR 8 - 2015
OFFICE OF THE CLERK

No. 14-275

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF SUN-MAID GROWERS OF CALIFORNIA AND THE RAISIN BARGAINING ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Sun-Maid Growers of California ("Sun-Maid") is an agricultural marketing cooperative,[2] and the largest single marketer of raisins in the world. Sun-Maid is owned by approximately 650 raisin farmers who are members, or equity owners, of the cooperative. Sun-Maid was originally founded in 1912 as the California Associated Raisin Company. The trademark "Sun-Maid," which features a young woman wearing a red bonnet and holding a tray of freshly-picked grapes, was first created in 1915, and the cooperative changed its name in 1922 to identify more closely with its highly successful brand. The "Sun-Maid" trademark remains one of the world's most identifiable food brands to this day.

On behalf of its 650 farmer members, Sun-Maid presently processes and markets about 30% of the California raisin crop; since California is responsible for 40-45% of world raisin production, Sun-Maid's share of the world crop is approximately 12-15%.

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[1] No counsel for any party authored this brief in whole or in part, nor did any party make a monetary contribution to the brief. Petitioners and respondent consented to the filing of this brief.

[2] Sun-Maid is incorporated under the laws of California, in particular the provisions of Cal. Food & Agric. Code § 54000 *et seq.*, dealing with agricultural marketing cooperatives. Pursuant to section 7.09 of Sun-Maid's Bylaws and Raisin Marketing Agreement, the cooperative is authorized to act "on behalf of each grower member under any governmental marketing agreement, order, program or plan relating to the marketing of raisins, including the exercise of any right to vote on behalf of each member."

The Raisin Bargaining Association ("RBA") is a non-profit agricultural cooperative association that incorporated on December 9, 1966. The RBA represents and advocates for its grower members in all aspects of their business, such as by negotiating a fair price for its members' raisins and seeking policy reform to protect its members' financial and real property interests. The RBA represents approximately 1,000 raisin farmers who produce about 30% of the California raisin crop annually.

Sun-Maid and the RBA—whose farmer constituents together produce approximately 60% of the California raisin crop—compete with petitioners, and are subject to the same regulatory regime that petitioners flouted in this case. Like petitioners, Sun-Maid's and the RBA's cooperative members grow their own raisin grapes to then be handled, and hence the cooperatives' members are "producers" for purposes of 7 C.F.R. § 989.11. Further, like petitioners, Sun-Maid itself also processes raisins, and thus is a "handler" for purposes of 7 C.F.R. § 989.15. Unlike petitioners, who have attempted to evade longstanding regulatory requirements to gain a competitive advantage, Sun-Maid and the RBA have played by the regulatory rules, and have an interest in seeing that petitioners, as competitors, also comply with the same regulatory rules governing the raisin industry in California.

STATEMENT

The California raisin industry has been subject to regulations authorized by the Agricultural Marketing Agreement Act of 1937 ("AMAA"), 7 U.S.C. §

601 *et seq.*, since 1949. The AMAA permits agriculture industry participants to collectively decide whether to regulate their respective industries. If favored by at least two-thirds of producers, the Secretary of Agriculture ("the Secretary" or "USDA") is authorized to enact a "marketing order" setting forth the framework for such industry self-regulation. *See* 7 U.S.C. § 608c(8), (9). Based upon such a supermajority vote of producers, the Secretary issued the California Raisin Marketing Order of 1949 ("marketing order"), 7 C.F.R. Part 989, which permits all California raisin industry participants to initiate, set up, and direct regulatory control over their industry. *Cf.* U.S. Dep't of Agric., PA-479, *Self-Help Stabilization Programs with Use of Marketing Agreements and Orders*, at 1 (1961), *available at*: http://archive.org/details/CAT31303082. This program is funded entirely by the industry, and administered by the Raisin Administrative Committee ("RAC")—which is composed of 46 industry representatives and one representative of the public. *See* 7 C.F.R. §§ 989.26, 989.29-30, 989.35-36.

The purpose of the raisin marketing order is, in essence, to help maintain orderly marketing conditions by regulating the handling of raisin supplies. That system benefits the entire raisin industry, including petitioners, by avoiding price volatility that was endemic prior to promulgation of the raisin marketing order. Such price stability "is especially important" for producers of "perishable commodities" such as raisins. E.M. Babb and Robert Bohall, *Marketing Orders and Farm Structure*, *in* U.S. Dep't of

Agric., No. AER 438, *Structure Issues of American Agriculture* 249, 251 (1979).

The marketing order can only properly function if it is mandatory; the AMAA was enacted in part because voluntary marketing associations for agricultural products authorized by the Capper-Volstead Act of 1922, 7 U.S.C. § 291, provided benefits to "free rider" producers that did not abide "by the shipping restrictions (price, quantity, or quality) incumbent on members." Steven A. Neff and Gerald E. Plato, U.S. Dep't of Agric., No. AER 707, *Federal Marketing Orders and Federal Research and Promotion Programs* 2 (1995).[3] "The AMAA eliminated the undercutting behavior of free riders by allowing the formation of marketing orders binding on all handlers if two-thirds of producers voted to approve the order." *Id.*

Petitioners challenge the marketing order's "reserve pool" provisions. Under the AMAA, a marketing order can only regulate "handlers," that is, processors and packers. 7 U.S.C. § 608c(1). The AMAA specifically exempts from regulation "any producer in his capacity as a producer." 7 U.S.C. § 608c(13)(B). Accordingly, the marketing order permits the Secretary, upon advice and recommendation of the RAC, to order *handlers* of raisins to withhold a certain

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[3] In the absence of mandatory compliance with the marketing order, "an individual handler could . increase the quantity sold *without* seeing a fall in price. If each handler would pursue that strategy, eventually less produce would be sold at a lower price." *Id.* at 4.

percentage of producers' yearly raisin crop in reserve. *See* 7 C.F.R. §§ 989.65-989.71.

This percentage, or the "reserve pool," is determined yearly by industry vote and separate regulation. During each crop year, the RAC applies the "Trade Demand" formula and considers supply, demand, estimated production, pricing, and other market conditions to arrive at a recommended reserve pool. *See* 7 C.F.R. §§ 989.54-55. The RAC must estimate the size of the reserve pool by October 5 and recommend the final reserve pool by February 15 of each crop year. The RAC arrives at its recommendation by majority vote. 7 C.F.R. § 989.38. If a reserve pool is recommended, the USDA thereafter designates it via interim and final rule. *See* 7 C.F.R. §§ 989.54-55. Once such reserve pool is set, handlers must set aside "reserve tonnage" raisins and await the RAC's direction regarding their disposition. *See* 7 U.S.C. § 608c(6)(E); 7 C.F.R. § 989.66(h). Reserve-tonnage raisins typically yield marginal, if any, profit for producers compared to raisins sold on the open market.

Petitioners are subject to such provisions due to being vertically integrated, in that they both produce and handle their own raisins. *See* Pet. App. 52a-53a. In addition, petitioners are subject to regulation because they handle the raisins of other producers that are not vertically integrated. *See* Pet. App. 36a-38a. Indeed, in this case, the bulk of petitioners' liability for violations of the marketing order stems from petitioners' failure, as handlers, to comply with the marketing order for raisins produced by other producers. During the two periods at issue here, peti-

tioners produced only 27.4% and 12.3%, respectively, of the raisins they handled. Pet. App. 248a.

Like petitioners, Sun-Maid is vertically integrated. But unlike petitioners, Sun-Maid complied with the raisin marketing order, by allocating the designated percentage of raisins to the reserve-tonnage pool, and thereby foregoing the profits potentially to be made by selling such raisins on the open market.

Petitioners, on the other hand, "deliberately" violated the raisin marketing order "to obtain an unfair competitive advantage over other California raisin handlers [such as Sun-Maid] who were in compliance with the Raisin Order." Pet. App. 32a, 33a (ALJ finding). That is to say, petitioners sought to take advantage of the higher market price for raisins that resulted from their competitors' compliance with the marketing order. Having been caught "free riding" on the marketing order at the expense of their competitors, petitioners now seek refuge in high constitutional principle. As discussed below and in the brief of the United States, that effort is unavailing.

SUMMARY OF THE ARGUMENT

1. The raisin market conditions that existed during the years in question (2002-2003 and 2003-2004) were of the kind contemplated by the AMAA, as the production surplus substantially exceeded trade demand, resulting in establishment of reserve-pool requirements. Petitioners, however, acted as free riders in defying the marketing order's reserve-pool requirements, and thereby gained a competitive advantage as *both* handlers and as producers.

2. In addition to the other remedies identified by the government, petitioners had administrative remedies available to them to challenge the marketing order's reserve-tonnage requirements. In their capacity as producers, petitioners could have petitioned the Secretary under the AMAA to amend or suspend the marketing order, and a denial of such relief would have been reviewable in district court under the Administrative Procedure Act. Indeed, because market conditions have fundamentally changed since the years at issue in this case, Sun-Maid—in its capacity as a producer—is pursuing exactly such relief at this time. Further, in their capacity as handlers, petitioners could have petitioned the Secretary to exempt them from the marketing order. Under the AMAA, petitioners would have been entitled to judicial review of the denial of such relief.

3. The Ninth Circuit below determined that petitioners are handlers for purposes of the AMAA, and petitioners do not challenge that determination. Thus, petitioners proceed in this action solely in their capacity as *handlers*.

In their capacity as handlers, petitioners have no property interest in the raisins subject to the marketing order's reserve-tonnage requirements. Instead, their defense is premised upon the taking of raisins owned by third parties, producers. Petitioners lack third-party standing to assert the interests of producers, however, because producers have no impediment to asserting their own constitutional rights. And, even if petitioners had such third-party standing to assert the interests of producers, it would be to no avail, because producers' interests are

outside of the zone of interests affected by enforcement of the marketing order against handlers.

4. Even if petitioners, as handlers, have third-party standing to assert the interests of producers as a defense, and even if those interests are within the relevant zone of interests, the marketing order's reserve-tonnage provisions do not effect a *per se* taking, because they do not "chop[] through the bundle" of property rights, "taking a slice of every strand." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). Under the AMAA, owners of the raisins retain a beneficial interest in the raisins, and are entitled to an "equitable distribution of the net return derived from the sale thereof." 7 U.S.C. § 608c(6)(E).

As the marketing order does not effect a *per se* taking, petitioners' takings defense is subject to a regulatory takings analysis under the standard set forth in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). Under that standard, petitioners' takings defense fails, because the marketing order is a reasonable regulation of an agricultural commodity in an attempt to stabilize producer prices. The increased market price resulting from the marketing order mitigates the economic impact on producers from reserve-tonnage requirements. Finally, because of the long-standing nature of the marketing order's regulatory requirements, petitioners had no "reasonable investment-backed expectations" such that they could defy the marketing order with impunity.

ARGUMENT

I. Then-Existing Market Conditions Justified the Establishment of a Reserve Pool, Which Applied to All Producers and Which Petitioners Flouted for Their Competitive Advantage

As discussed below, the reserve-pool provisions in 2002-2003 and 2003-2004 were necessary to stabilize the price of raisins under then-existing market conditions. All producers, including *amici* Sun-Maid growers and RBA growers, were affected by the marketing order's reserve-pool requirements—but only the petitioners exploited the industry's collective restraint for personal gain.

A. Market Conditions Justified the Imposition of a Reserve Pool in the Two Years in Question

During and after the Second World War, world trade was struggling and U.S. producers of agricultural commodities had production capabilities that exceeded their ability to reasonably sell their crop in commercial markets. The California raisin industry was no exception. The amount of raisins grown far exceeded the amount that could be economically marketed, leading to a sharp decline in the price of raisins. *See, e.g.*, *Parker v. Brown*, 317 U.S. 341, 363-64 (1943).

The marketing order was intended to "stabilize" the price of raisins by introducing volume regulation, or "reserve pool" provisions, which would reduce the supply of raisins reaching the commercial market.

See Lion Raisins, Inc. v. United States, 416 F.3d 1356, 1359 (Fed. Cir. 2005); 14 Fed. Reg. 5136-44 (Aug. 18, 1949). Under such provisions, the Secretary could order "handlers" of raisins to hold a certain percentage of yearly raisin production received from producers in reserve, thereby preventing this surplus from reaching the commercial market. *See* 7 C.F.R. §§ 989.65-989.71.

The raisin industry faced surplus supply relative to demand in the 2002-2003 and 2003-2004 crop years, necessitating a reserve pool of raisins to ensure price stabilization. *See* 68 Fed. Reg. 41686-88 (July 15, 2003) (finding reserve pool of natural seedless raisins for 2002-2003 crop was necessary because supply exceeded trade demand by 274 percent); 69 Fed. Reg. 50289, 50291 (Aug. 16, 2004) (finding reserve pool for 2003-2004 crop of natural seedless raisins was necessary because supply exceeded trade demand by 200 percent). Such substantial oversupply mirrored conditions dating to the marketing order's inception, and the subsequent reserve pool was essential to stabilizing the price of raisins. Because all raisin industry handlers (other than petitioners) complied with marketing order's reserve-tonnage requirements, the marketing order inured to the benefit of all industry participants in the years in question.[4]

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[4] Importantly, market conditions fundamentally changed starting in the 2010-2011 crop year. Due to a permanent shift in acreage planted with raisin variety grapes, supply can no longer outstrip demand. Accordingly, no reserve pool was set for the 2010-2011, 2011-2012, 2012-2013, and 2013-2014 crop years,

B. The Regulatory Burdens of the Reserve Pool Are Shared by All Producers and Are Not Exclusive to Petitioners

In each crop year, the RAC is permitted under the marketing order to recommend to the Secretary of Agriculture whether market conditions warrant limiting "the percentage of raisins that may be sold in the market by dividing the raisin crop into 'reserve tonnage' and 'free tonnage.'" Pet. Br. 6 (citing 7 C.F.R. §§ 989.66, 989.166). When a reserve tonnage is set, producers still physically deliver their crop to a handler, who must set aside the reserve raisins "for the account of" the RAC. Pet. Br. 6; 7 C.F.R. §§ 989.65, 989.66(a). Handlers pay producers for the free-tonnage raisins the handlers purchase, but not for the reserve-tonnage raisins that handlers hold for the RAC. *See* Pet. Br. 6-7. Producers therefore do not receive immediate payment for reserve tonnage, but must instead await the RAC's disposition of such raisins. *See* 7 C.F.R. § 989.66(h). If proceeds remain, taking into account the costs associated with the storage and disposition of the reserve raisins, such net proceeds must be remitted by the RAC to producers on a pro rata basis. *Id.* Accordingly, "it is the producer who bears the economic burden of the program." Pet. Br. 7.

These provisions applied to all California raisin producers and handlers in the 2002-2003 and 2003-2004 crop years. Yet only petitioners (who, while

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and no reserve pool will be set for the 2014-2015 crop year. Pet. Br. 8.

proceeding solely as handlers in this action, were also producers during the relevant times) exploited other industry participants' compliance with the reserve pool, including that of Sun-Maid and the RBA, for personal financial gain.

C. Petitioners Secured a Significant Commercial Advantage Over Their Competitors by Ignoring the Reserve Pool and Free Riding on the Marketing Order

It is undisputed that, by selling both other growers' and their own reserve-tonnage raisins in the commercial market, petitioners obtained a competitive advantage *both* as handlers and producers, and thus "an unfair competitive advantage over *everyone* in the raisin industry who complied with the Raisin Order and its regulations." Pet. App. 47a (ALJ determination) (emphasis added).

As handlers, petitioners claimed that raisins they processed were exempt from the marketing order because they did not "acquire" raisins as handlers, but instead merely "leased" their facilities and employees to other producers, and thereby sought to attract business from producers eager to avoid reserve-tonnage requirements. The ALJ found that petitioners "benefitted under these arrangements [as handlers] from the fees that [they] received from growers for the 'rental of [their] equipment.'" Pet. App. 38a.

As producers, petitioners were able to sell their own reserve-tonnage raisins at a market price supported by the marketing order, which translated to a market value of $483,843.53. Pet. App. 110a (finding

of USDA Judicial Officer). Petitioners were able to obtain this higher market price precisely because their competitors such as Sun-Maid and the RBA complied with the marketing order and withheld their reserve-tonnage raisins from the market.

Petitioners' competitors, including Sun-Maid and the RBA, recognize that collective self-governance can only succeed if industry participants work within established procedures. By fining petitioners and divesting them of their ill-gotten gains, the USDA preserved the marketing order's efficacy and the raisin industry's self-governance.

II. Petitioners Had Multiple Lawful Avenues for Relief

Rather than undermine their competitors and leverage the marketing order in an act of commercially-motivated civil disobedience, petitioners could instead have brought a challenge to the marketing order's reserve-pool provisions in either their capacity as producers or as handlers.[5] The AMAA provided petitioners with at least two administrative remedies to challenge the marketing order in addition to the other remedies cited by the government.

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[5] It is undisputed that, before developing their scheme to clean, stem, sort, and package raisins, petitioners were solely producers of raisins. Pet. App. 247a.

A. As Producers, Petitioners Could Have Petitioned the Secretary to Modify or Suspend the Marketing Order Under AMAA Section 608c(16)

In their capacity as producers, petitioners could have sought relief under the AMAA, which states that the "Secretary of Agriculture shall, whenever he finds that any order issued under this section, or any provision thereof, obstructs or does not tend to effectuate the declared policy of this chapter, terminate or suspend the operation of such order or such provision thereof." 7 U.S.C. § 608c(16). Petitioners devised their handling operation to avoid application of the marketing order, which they viewed as failing to achieve its desired purpose. Pet. App. 247a n.3 (relaying the Horne's grievances). But petitioners could have expressed these grievances through a petition requesting the USDA modify or suspend the marketing order's volume restrictions under § 608c(16).

Unlike petitioners, Sun-Maid recently invoked this very process to express its concerns to the USDA in light of dramatically changed market conditions. On November 17, 2014, pursuant to § 608c(16) and 5 U.S.C. § 553(e), Sun-Maid submitted to the Secretary of Agriculture a petition to initiate rulemaking suspending and ultimately terminating the marketing order's volume restrictions. In its petition, Sun-Maid detailed why volume restrictions are no longer necessary for the raisin industry.

The Secretary denied Sun-Maid's petition on January 7, 2015. Sun-Maid thereafter sought judicial review under the Administrative Procedure Act

of this refusal to initiate rulemaking. Sun-Maid's challenge is currently pending in the District Court for the District of Columbia. *See* Complaint (Dkt. No. 1), *Sun-Maid Growers of California v. USDA*, No. 1:15-cv-00496 (D.D.C. Apr. 6, 2015).

B. As Handlers, Petitioners Could Have Petitioned the Secretary to Exempt Them from the Marketing Order Under AMAA Section 608c(15)(A)

Alternatively, in their capacity as handlers, petitioners could have sought relief in 2002-2003 and 2003-2004 under a different provision of the AMAA, which provides that "[a]ny handler subject to a[] [marketing] order may file a written petition with the Secretary of Agriculture stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom." 7 U.S.C. § 608c(15)(A). Denials of such relief are reviewable in district court. *See* 7 U.S.C. § 608c(15)(B).

Petitioners were indisputably aware of this avenue because they belatedly filed such a petition in March 2007 and, after it was denied, sought judicial review in March 2008. *See* Complaint (Dkt. No. 1), *Horne v. USDA*, No. 1:08-cv-00402 (E.D. Cal. Mar. 18, 2008).[6] But petitioners did not pursue this ave-

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[6] Despite their failure to receive actual notice of the Secretary's denial of their petition, petitioners' complaint was dismissed as untimely filed, and neither the district court nor the Ninth Circuit reached the merits. *See* Mem. Decision Re: Def.'s Mtn. to Dismiss (Dkt. No. 25), *Horne v. USDA*, No. 1:08-cv-00402 (E.D.

nue until *after* the ALJ had found they violated the AMAA and the marketing order and imposed a fine. *See* Pet. App. 54a-55a (ALJ Decision and Order issued on December 8, 2006); Complaint at 3 (Dkt. No. 1), *Horne v. USDA*, No. 1:08-cv-00402 (E.D. Cal. Mar. 18, 2008 (noting petition was filed on March 5, 2007).

Rather than seek such relief in 2002-2003 and 2003-2004, after being informed they would be subject to the marketing order as "handlers," *see* Pet. App. 34a-41a (finding petitioners were notified by the Secretary in 2001 and 2002, and by the RAC twice during each of the 2002-2003 and 2003-2004 crop years, that they were considered "handlers" subject to the marketing order), petitioners opted to pursue this avenue only after they were called to account for willfully flouting the marketing order.

* * *

Rather than unilaterally leverage the marketing order's compelled collective action for financial gain, Sun-Maid continues to work within the law to bring about beneficial change on behalf of the raisin industry. Petitioners, on the other hand, have eschewed proper procedural avenues and sought to leverage the industry's collective action for their own pecuniary gain.

Cal. Nov. 13, 2008); *Horne v. USDA*, 395 F. App'x 486 (9th Cir. 2010).

III. Petitioners Lack Standing to Assert the Interests of Producers in This Enforcement Action Against Them in Their Capacity as Handlers

To assert a valid takings defense, petitioners must first identify the property taken from them. But petitioners, proceeding in this enforcement action solely as handlers, do not and cannot identify *any* property taken from them *in this capacity*. Instead, their defense is premised upon the taking of raisins owned by third parties, producers. Petitioners lack third-party standing to assert this defense, however, because producers have no impediment to asserting their own constitutional rights. And, even if petitioners had such third-party standing, it would be to no avail, because producers are outside of the zone of interests regulated by enforcement of the marketing order.

A. As Handlers, Petitioners Have No Property Interests to Assert as a Defense

In their first visit to this Court, petitioners did not challenge the Ninth Circuit's original determination that "the [petitioners] . . . satisfy the regulation definition of a 'packer' and are thus 'handlers' subject to the Raisin Marketing Order's provisions." Pet. App. 202a-203a. Accordingly, this Court in *Horne I* repeatedly noted that petitioners are proceeding solely in their capacity as handlers. *See, e.g.*, Pet. App. 252a ("It is undisputed that the Marketing Order imposes duties on petitioners only in their capacity as handlers. As a result, any defense raised against those duties is necessarily raised in that

same capacity."); *id.* ("[P]etitioners' takings claim makes sense only as a defense to penalties imposed upon them in their capacity *as handlers*."); *id.* at 257a (permitting petitioners to assert takings claim solely because "petitioners (as handlers) have no alternative remedy"). It is therefore the law of this case that petitioners are proceeding *solely* in their capacity as handlers. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988) (noting that "law of the case" doctrine "'posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'" (quoting *Arizona* v. *California*, 460 U.S. 605, 618 (1983))).

Accordingly, petitioners must identify a property interest held by them *in their capacity as handlers* to assert a valid takings defense. Establishing a compensable property right is a necessary predicate to asserting a takings defense. *See, e.g., Landgraf v. Usi Film Prods.*, 511 U.S. 244, 266 (1994) ("The Fifth Amendment's Takings Clause prevents the Legislature (and other government actors) from depriving private persons of vested property rights . . . .").

Petitioners argue their compensable property interest derives ultimately from the compelled transfer of reserve-tonnage raisins to the RAC (or a fine in lieu thereof). *See* Pet. Br. 21 ("[T]he Marketing Order physically deprives raisin *producers* of a large portion of their raisin crop and compels transfer of those raisins to the RAC, the agent of the USDA, without just compensation." (emphasis added)). But a property interest in reserve-tonnage raisins is held only by producers. *See id.* at 22 ("*From the growers' perspec-*

tive, the effect of the Raisin Marketing Order is to deprive them of the right to possess, use and dispose of their raisins and to hand that right over to the United States." (internal quotation marks omitted and emphasis added)); *id.* at 25 ("The RAC's seizure of the right to possess and dispose of the raisins thus amounts to a taking no matter who has formal title."). Nowhere do petitioners argue that the possession, control, or title to reserve-tonnage raisins was ever held by them *as handlers*. To that contrary, petitioners' argument turns upon their assertion that there is a direct transfer of title to (or at least a direct transfer of possession and control of) reserve-tonnage raisins from producers to the RAC. *See id.* at 24-25. Petitioners do not argue that they, as handlers, ever obtained a property right in reserve-tonnage raisins.

Petitioners do not make this argument because they cannot. Handlers have no possessory or dispositional interest in reserve-tonnage raisins. *See* 7 C.F.R. § 989.66(a) (requiring handler to hold reserve-tonnage raisins "for the account of" the RAC); § 989.66(b)(1)-(4) (directing handler to store such reserve tonnage "separate and apart" from other raisins and to store and deliver these raisins as directed by the RAC). Handlers have no financial interest or investment in reserve-tonnage raisins. *See* Pet. Br. 6-7 ("But handlers pay producers only for the free-tonnage raisins. They pay nothing for the reserve-tonnage raisins that they transfer to the government." (citation omitted)); 7 C.F.R. § 989.66(f) (providing for payment to handlers for "receiving, storing, fumigating, handling, and inspection" of re-

serve-tonnage raisins, as well as payment for the bins holding such raisins). And handlers have no contingent interest in reserve-tonnage raisins. *See* 7 U.S.C. § 608c(6)(E) (entitling only producers to "equitable distribution of the net return" of such raisins); 7 C.F.R. § 989.66(h) (vesting contingent interest in net proceeds from disposition of reserve-tonnage raisins in producers, not handlers). Accordingly, handlers never obtain a property interest in reserve-tonnage raisins.

In short, nothing was taken from petitioners in their capacity as *handlers*. Instead, their takings defense is a thinly veiled attempt to proceed in this enforcement action as producers—a defense that failed in the Ninth Circuit below. As discussed below, petitioners have no standing to invoke the constitutional rights of producers.

B. As Handlers, Petitioners Do Not Have Third-Party Standing to Assert the Property Rights of Producers

In general, a litigant "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). This Court, however, has recognized an exception to this rule in cases where "the party asserting the right has a 'close' relationship with the person who possesses the right," *and* where "there is a 'hindrance' to the possessor's ability to protect his own interests." *Kowalski*, 543 U.S. at 130.

The latter consideration is dispositive, as petitioners cannot show that producers have any "hindrance" in asserting whatever takings rights that producers may have against the marketing order. The Court of Federal Claims was open and fully available to producers to seek compensation, if any, for net losses resulting from the raisin reserve-pool requirements established by the RAC in 2002-2003 and 2003-2004. As producers had no hindrance to asserting their rights in the Court of Claims, petitioners do not have third-party standing to invoke the rights of producers as a defense to petitioners' violations of the marketing order as handlers.

C. Even If Petitioners Have Third-Party Standing, the Interests of Producers Are Outside the Zone of Interests of the Marketing Order As It Relates to Enforcement Against Handlers

Finally, even if petitioners may otherwise invoke the rights of producers, it is to no avail if producers' interests are outside of the zone of interests of the marketing order as it relates to enforcement against handlers. "If the litigant asserts only the rights of third parties, then he may satisfy the zone of interests requirement by reference to third parties' interests if the court determines that the litigant has third party standing *and* that the third party's interests fall within the relevant zone of interests." *Haitian Refugee Center v. Gracey*, 809 F.2d 807, 812 (D.C. Cir. 1987) (Bork, J.) (emphasis added).

The zone of interests test requires that a litigant's asserted interests fall "'within the zone of in-

terests to be protected *or regulated* by the statute or constitutional guarantee in question.'" *Bennett v. Spear*, 520 U.S. 154, 163 (1997) (emphasis added and quoting *Ass'n of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 153 (1970)). Although *producers'* property interests are unquestionably within the zone of interests of the Takings Clause, those interests are not implicated by the marketing order's enforcement against handlers. *See* 7 U.S.C. § 608c(13)(B) (specifically exempting from the marketing order "any producer in his capacity as a producer"). Because Congress has expressly provided that the marketing order only regulates handlers, petitioners may not assert the property interests of producers as a defense in this enforcement action against petitioners in their capacity as handlers, as those interests are outside of the relevant zone of interests.

IV. To the Extent that Petitioners Have Standing to Assert a Takings Defense in Their Capacity as Handlers, the Defense Should Fail Under the Applicable Regulatory Takings Analysis

Even if petitioners, as handlers, have third-party standing to assert the interests of producers as a defense in this enforcement action, and even if those interests are within the relevant zone of interests, petitioners cannot demonstrate that the marketing order effects a regulatory taking. The marketing order constitutes a use restriction justified by the resulting stabilized price of raisins, producers' contingent interest in the disposition of reserve-tonnage

raisins, and the benefits of collective industry self-governance.

Initially, the marketing order's reserve-tonnage provisions do not effect a *per se* taking. A *per se* taking arises where government regulation results in a "permanent physical occupation" of property, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432 (1982), or "where regulation denies all economically beneficial or productive use of land." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992). In both instances, however, the regulation "d[id] not simply take a single 'strand' from the 'bundle' of property rights," but "chop[ped] through the bundle, taking a slice of every strand." 458 U.S. at 435.

Under the marketing order, the RAC does not divest producers of *all* property rights in their reserve-tonnage raisins. To the contrary, producers retain a contingent interest in the proceeds from the disposition of the reserve raisins. *See* 7 U.S.C. § 608c(6)(E); 7 C.F.R. § 989.66(h). Accordingly, as the Ninth Circuit correctly found, neither *Loretto* nor *Lucas* governs. *See* Pet. App. 18a, 22a.

Outside of these two contexts, this Court evaluates regulatory takings challenges under the standard set forth in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). Under *Penn Central*, the Court engages in a "case-specific inquiry into the public interest advanced in support of the restraint." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005). In doing so, the Court evaluates (1) the "character of the governmental action"; (2) the "economic impact of the regulation on the claimant";

and (3) "the extent to which the regulation has interfered with distinct investment-backed expectations." *Penn Central*, 438 U.S. at 124.

Petitioners do not even bother contesting the outcome of this analysis, which falls heavily in favor of the government.

First, the "character of the governmental action" is that of a reasonable regulation of the commercial market for an agricultural commodity designed to promote price stabilization and industry stability. Importantly, the regulation is imposed by the USDA only at the request of a super-majority vote of the regulated industry. This is a self-help and industry-funded regulatory program. It would be anomalous if an industry could impose regulation upon itself, and then turn around and seek compensation from the government for the costs of that regulation.

Second, the "economic impact of the regulation of the claimant" is an attempt to stabilize prices for raisins, which increases producer returns and ensures long-term industry stability. Any loss of value of reserve-tonnage raisins is offset by the increase in value of free-tonnage raisins.

Third, the marketing order cannot undercut any valid "investment-based expectations." To the contrary, petitioners pointedly informed the USDA in 2002 that they intended to violate the marketing order because, after decades of growing raisins, the marketing order "has become a tool for grower bankruptcy, poverty, and involuntary servitude." Pet. App. 247a n.3. As producers, petitioners knew that they could not market their raisins without comply-

ing with any reserve-pool requirements, and therefore could have no valid investment-backed expectations. As handlers, petitioners knew that a certain portion of the crop might be set aside as reserve tonnage. Accordingly, even if the petitioners have the capacity to assert a takings defense, that defense must fail.

CONCLUSION

For the reasons provided above and in the respondent's brief, this Court should affirm the decision below.

April 8, 2015

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Supreme Court, U.S.
FILED
MAR 9 - 2015
OFFICE OF THE CLERK

No. 14-275

In the Supreme Court of the United States

MARVIN D. HORNE, ET AL.,
Petitioners,
v.
UNITED STATES DEPARTMENT OF AGRICULTURE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE STATES OF TEXAS, ARIZONA, AND NORTH DAKOTA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Marketing orders promulgated under the Agricultural Marketing Agreement Act of 1937 (Act) govern the production of fruits and vegetables grown on a large scale in the amici States. *See, e.g.*, 7 C.F.R. § 906 (Texas Rio Grande valley oranges and grapefruit); 7 C.F.R. § 959 (South Texas onions); 7 C.F.R. § 983 (Arizona pistachios). Any agricultural product within the scope of the Act is potentially subject to appropriation through a marketing order similar to the Raisin Marketing Order at issue here. Though that order's reserve requirement does not feature in all marketing orders under the Act, it is not unique to raisins. *See, e.g.*, 7 C.F.R. § 981.52 (almonds); 7 C.F.R. § 993.57 (prunes). Because the amici States and their citizens currently operate under marketing orders, and because additional marketing orders may issue, they have an interest in the correct resolution of the questions presented.

SUMMARY OF ARGUMENT

Under the Secretary's Raisin Marketing Order, the Hornes face a choice: part with sometimes 40% or more of their annual raisin crop without just compensation, or keep it and face fines amounting to its dollar equivalent plus additional monetary penalties. The Raisin Marketing Order is therefore a taking. This is not changed by the fact that the Hornes might retain some token interest in the proceeds left over after the government disposes of their reserved raisins, or that the Hornes are parting with a portion of their crop rather than the en-

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[1] Pursuant to Supreme Court Rule 37.4, consent of the parties is not required for the States to file this amicus brief.

tire amount. The Order works a taking for which the federal government would owe just compensation, but neither the Act nor the Order provides just compensation. The Hornes may defend against the monetary penalties sought here because they are based on the Hornes' failure to accede to an unconstitutional government action.

The Takings Clause serves as an important check on the government's eminent-domain power. The amici States, although condemnors themselves, respect the obligation imposed by the Takings Clause and seek to ensure that their own citizens—hundreds of thousands of whom work in the agricultural industry—are not threatened with and do not suffer similar uncompensated takings at the hands of the federal government.

ARGUMENT

I. The Raisin Marketing Order Exacts a Taking for Which Just Compensation Is Due.

A. The Hornes suffered a paradigmatic or *per se* taking.

"The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005) (citing *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951); *United States v. Gen. Motors Corp.*, 323 U.S. 373 (1945)). Additionally, the Court recognizes "two categories of regulatory action that generally will be deemed *per se* takings for Fifth Amendment purposes." *Id.* at 538. The first is a regulation that "requires an owner to suffer a permanent phys-

ical invasion of her property—however minor." *Id.* (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)). The second applies to use restrictions that do not result in physical invasion but which "completely deprive an owner of 'all economically beneficial us[e]' of her property." *Id.* (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992)).

The Raisin Marketing Order, which requires the Hornes to surrender a portion of their crop each year to the government or a government-designated recipient, 7 C.F.R. §§ 989.65-67, qualifies as both a paradigmatic and *per se* physical taking under the Court's precedents. First, it effects a direct government appropriation of a possessory interest in private property, *i.e.*, a "paradigmatic taking." The Order does not merely tell the Hornes how they can sell the raisins; it requires the Hornes to put the raisins in a separate location, so the government can pick them up, use them, or dispose of them as the government wishes.

Second, because the Order's regulatory burdens entail asserting possessory rights over the raisins, it is a *per se* taking rather than a use restriction. Through operation of the reserve requirement, the federal government asserts physical and permanent control of that portion of the Hornes' crop that they are required to set aside. The government "forever denies the [Hornes] any power to control the use of the property." *See Loretto*, 458 U.S. at 436.

For these reasons, the Fifth Amendment requires the federal government to provide the Hornes just compensation when it takes their raisins. It does not matter

that the Secretary does not seize the Hornes' entire crop. Permanent relinquishment of any portion of a person's property is a taking. *See Brown v. Legal Found. of Wash.*, 538 U.S. 216, 233 (2003) ("When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof." (internal quotation marks and citation omitted)). Nor does it matter that the raisins are personal, rather than real, property. *See id.* at 235 (applying *per se* takings analysis to interest earned on IOLTA accounts); *United States v. Burnison*, 339 U.S. 87, 93 n.14 (1950) (taking of "personalty" requires just compensation); *United States v. Russell*, 80 U.S. 623 (1871) (seizure of steamboats).

B. The Secretary cannot avoid the Fifth Amendment's just-compensation requirement by imposing a fine for the Hornes' resistance to an uncompensated taking.

1. The Ninth Circuit emphasized that the Hornes, rather than cooperate with the Marketing Order, rebuffed the government's attempt to seize their raisins, kept and disposed of those raisins, and were fined. *See Horne v. USDA*, 750 F.3d 1128, 1138 (9th Cir. 2014) (*Horne II*) (suggesting that only regulatory-takings analysis could apply because "the government neither seized any raisins from the Hornes' land nor removed any money from the Hornes' bank account"). That reasoning is misguided. It repeats the same error that led this Court to intervene the first time.

The Hornes argue that the government has no authority to impose the monetary penalty because the Takings Clause denies the government the authority to compel them to turn over their raisins in the first place without providing just compensation. *See Horne v. USDA*, 133 S. Ct. 2053, 2061 (2013) (*Horne I*) (describing the Hornes' argument: "'assuming we are handlers, fining us for refusing to turn over reserve-tonnage raisins violates the Fifth Amendment'"). This Court has already determined that the law does not provide for such compensation through a Tucker Act suit. *Id.* at 2062 ("the AMAA provides a comprehensive remedial scheme that withdraws Tucker Act jurisdiction over a handler's takings claim"). So the only remaining issue is whether the Marketing Order would cause a "taking" of their raisins such that the Hornes are being punished for resisting an uncompensated taking.

The Hornes thus assert the Takings Clause as a *limit* on government action, just as defendants raise First Amendment, Commerce Clause, and Due Process Clause limits to defend against civil or criminal proceedings. *See, e.g.*, *United States v. Comstock*, 560 U.S. 126 (2010) (Commerce Clause challenge to civil-commitment action); *United States v. Stevens*, 559 U.S. 460 (2010) (First Amendment challenge to crush-video prosecution); *United States v. Lopez*, 514 U.S. 549 (1995) (Commerce Clause challenge to gun-possession prosecution); *Lam-*

bert v. California, 355 U.S. 225 (1957) (Due Process Clause challenge to felon-registration prosecution).[2]

The Hornes are not conceding that the Marketing Order is lawful and arguing that the taking is the Secretary's imposition of monetary liability for failing to turn over raisins. If the reserve program is lawful, the agency of course may impose a penalty for noncompliance. The Hornes' defense is that the Takings Clause denies the government authority to implement the raisin-reserve program at all, precisely because it provides no mechanism for paying just compensation. *See Ex parte Young*, 209 U.S. 123, 165 (1908) (although injunctive relief is available to block unconstitutional government action, "We do not say the company could not interpose [the constitutional arguments] as a defense in an action to recover penalties or upon the trial of an indictment."). The Takings Clause is thus available as a defense to es-

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[2] The Hornes' Takings Clause defense is fully ripe under Article III, despite the fact that they have not litigated a separate claim for just compensation. *Horne I*, 133 S. Ct. at 2063; *cf. Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985). In all events, if the government were to argue that the Hornes must affirmatively seek compensation through litigation, that still does not affect ripeness because the Hornes are not alleging a regulatory taking. Moreover, *Williamson County*'s state-litigation requirement is misguided. As Chief Justice Rehnquist recognized in his concurrence in the judgment in *San Remo Hotel, L.P. v. City of San Francisco*, this state-litigation requirement "has created some real anomalies," essentially closing federal courthouse doors to plaintiffs challenging regulatory takings. 545 U.S. 323, 351 (2005), quoted in *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 742 (2010) (Kennedy, J., concurring in part and concurring in the judgment).

tablish that the ordered forfeiture of raisins is *ultra vires*, in the same way that other constitutional provisions may render government action invalid.

The Ninth Circuit examined the wrong doctrine. It should not have jumped to a use-restriction analysis simply because the government did not, in fact, seize raisins from the Hornes' land. *Horne II*, 750 F.3d at 1138. It should have found a taking without ever looking to the regulatory-takings doctrine described in *Lucas* because the government ordered that raisins be turned over on penalty of fines.

2. The fact that in this case the Department never obtained the raisins, but instead imposed a penalty (greater, in fact, than the market value of the crop) does not itself somehow save that order from classification as a *per se* taking. As explained, the inquiry must examine the taking actually ordered (and resisted): a taking of tangible, personal property. Nor could the practical choice presented to the Hornes—turn over their property without just compensation or pay its dollar equivalent as a penalty—justify treating the Marketing Order as something other than a paradigmatic or *per se* taking. *See Brown*, 538 U.S. at 235; *see also Mo. Pac. Ry. Co. v. Nebraska*, 217 U.S. 196, 205-08 (1910) (statute requiring company to construct additional track or pay fine challengeable as a taking); *Village of Norwood v. Baker*, 172 U.S. 269, 279 (1898) (assessment of cost of public improvement amounted to a taking "under the guise of taxation").

The Ninth Circuit disagreed, reasoning that the *per se* takings analysis did not apply because "the Hornes

[we]re not completely divested of their property rights, even with respect to the reserved raisins." *Horne II*, 750 F.3d at 1139. The court pointed to the possibility that the Hornes might receive an equitable distribution in some years, though it acknowledged that distributions were not made every year. *Id.* at 1140-41. The court also speculated about an unquantifiable benefit that the Hornes allegedly derive from the Raisin Administrative Committee's efforts to stabilize the American raisin market. *Id.* at 1141. These "token interests," however, cannot alter the basic nature of the government's action as a *per se* taking. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 323 (2002) (courts "do not ask" whether a physical taking results in a total economic loss); *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001) ("Assuming a taking is otherwise established, a State may not evade the duty to compensate on the premise that the landowner is left with a token interest.").

The Ninth Circuit's reasoning misapplies this Court's takings jurisprudence. In the circuit's view, the question of what line of cases to apply turned on the fact that a monetary exaction was imposed in lieu of a physical appropriation. *Horne II*, 750 F.3d at 1138. That fact, the court concluded, required it to analyze the Marketing Order under the use-restriction rubric. *Id.*

That is wrong. The relevant question is whether the property owner would suffer a physical deprivation of his property or a permanent invasion of his property. *Lingle*, 544 U.S. at 538. If so, the property owner is entitled to just compensation. *Id.* If not, then, and only

then, should courts analyze the act as a use restriction and weigh the factors articulated in *Penn Central* to determine if a taking has occurred. *Id.* at 538-39; *see Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978). As discussed above, the Marketing Order would work a possessory transfer of the Hornes' raisins. The federal government is therefore required to provide just compensation for that taking.

A hypothetical illustrates the point. If a government order instructs a land owner to either physically surrender the land to the government without just compensation or else pay a penalty, that order would manifestly qualify as a taking of the land.[3] *See Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2600 (2013); *Village of Norwood*, 172 U.S. at 279. Even examining solely the fine, the order would not simply limit the owner's use of the property or partially diminish its value. It would amount to a penalty for exercising the Fifth Amendment right against takings of property without just compensation in return.

The Court's holdings in *Palazzolo* and *Lucas* also offer a helpful comparison. Those two cases involved use restrictions rather than physical invasions of property, but they illustrate the proper domain of use-restriction analysis. In *Palazzolo*, the landowner was subject to a regulation that *limited* his ability to develop a parcel of

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[3] This hypothetical—like this case—does not involve the "special context of land-use exactions" addressed in *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). *See Lingle*, 544 U.S. at 538, 546-48.

land, but did not entirely forbid development. 533 U.S. at 630-31 ("Petitioner accepts the Council's contention and the state trial court's finding that his parcel retains $200,000 in development value under the State's wetlands regulations."). *Palazzolo* remanded the case to the state court to apply the *Penn Central* factors. *Id.* at 630. The regulation in *Lucas*, on the other hand, barred the property owner from erecting any permanent habitable structures on his land, rendering it "'valueless.'" 505 U.S. at 1007. The Court noted that in physical-takings cases, "no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation." *Id.* at 1015. Because no intrusion had taken place, however, the Court then went on to address the special case of use restrictions that did not interfere with ownership but which effect a total deprivation of value. *Id.* at 1015-18. In those cases, the use restriction is treated as tantamount to a *per se* taking because "it is less realistic to indulge our usual assumption that the legislature is simply 'adjusting the benefits and burdens of economic life' in a manner that secures an 'average reciprocity of advantage' to everyone concerned." *Id.* at 1017-18 (quoting *Penn Cent.*, 438 U.S. at 124; *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)). Neither of these cases is applicable here, however, where penalties were imposed for resisting a physical intrusion.

Even in cases where there is neither a physical invasion nor a complete deprivation of value, the Court's *Penn Central* line of regulatory-takings cases still provides an important constitutional check: it ensures that under some circumstances, property owners who do not

suffer a physical taking or a total deprivation of value resulting from a use restriction are not without a remedy. *See Lingle*, 544 U.S. at 539 (noting the Court's regulatory-taking jurisprudence "identif[ies] regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain"). Thus, individuals who have suffered something less than a physical invasion or total loss may still have recourse.

These cases also ensure that, when a regulation exacts something less than a total deprivation of value, the government's action is tied to a valid government purpose and is not overly burdensome. While "a permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine," *Loretto*, 458 U.S. at 432, courts examine the harm from a less-than-complete elimination of value in light of its "interfere[nce] with distinct investment-backed expectation" and "the character of the governmental action." *Penn Central*, 438 U.S. at 124.

Where there is a seizure of ownership, the Court has established a balancing test applicable *only* in the context of land-use permitting. *Nollan* and *Dolan*'s nexus and proportionality requirements ensure that the government cannot demand an interest in property unless it establishes (1) a valid government interest, (2) a nexus between the condition of the permit and the original purpose of the restriction, *Nollan*, 483 U.S. at 837, and (3) that the condition is roughly proportional "both in nature and extent to the impact of the proposed develop-

ment," *Dolan*, 512 U.S. at 391. Without these assurances, the government's action is presumed to be a bare property seizure without just compensation, the very sort of evil prohibited by the Takings Clause. *See Nollan*, 483 U.S. at 837 ("In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but an out-and-out plan of extortion." (internal quotation marks omitted)).

In all events, *Penn Central*, *Nollan*, and *Dolan* need not be considered here because the Secretary has not "simply take[n] a single 'strand' from the 'bundle' of property rights" the Hornes enjoyed in their reserved raisins; he has "chop[ped] through the bundle, taking a slice of every strand." *Loretto*, 458 U.S. at 435. Because the order to turn over raisins (or else pay their value as a fine) directs a total loss of the Hornes' reserved raisins, the federal government must pay just compensation regardless of any government interest. The reserve program fails to do so, allowing no Tucker Act claim and no other mechanism for full payment. The Order the Hornes are being penalized for resisting is thus outside the government's authority. The Hornes' Takings Clause defense is valid.

II. No Government Should Be Permitted to Penalize Resistance to an Uncompensated Taking.

Subject to the Constitution's public-use and just-compensation requirements, U.S. Const. amend. V, the amici States exercise condemnation power. They use this power to expand highways, manage flood-control efforts, provide park and recreation facilities, and pre-

serve historical sites. *See, e.g.*, Tex. Transp. Code § 224.001; Tex. Gov't Code § 2166.055; Tex. Loc. Gov't Code § 561.001; Tex. Parks & Wild. Code § 13.305(a). And while "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," *Mahon*, 260 U.S. at 413, the Takings Clause provides a necessary restriction on governments' ability to appropriate their citizens' private property.

The amici States recognize the importance of this restriction. From a fiscal perspective, governments would undoubtedly benefit from being relieved of the Takings Clause's just-compensation requirement. But, "[a]s Chief Justice John Marshall observed: 'The government of the Union, then, . . . is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.'" *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 821 (1995) (quoting *M'Culloch v. Maryland*, 17 U.S. 316, 404-05 (1819)). It is thus not only inconsistent with the Constitution, but also unwise as a policy matter, to evade takings claims as the federal government has done here. Governments owe their citizens a duty to protect their private property interests. And the States have an interest—indeed, an obligation—to ensure that the federal government does not penalize their citizens for failing to give up their property without just compensation.

Congress has authorized the Secretary of Agriculture to "remove from the normal channels of trade and commerce quantities of any basic agricultural commodity

or product thereof." 7 U.S.C. § 608(3)(a). Multiple agricultural commodities produced in the amici States are already subject to USDA marketing orders. *See supra* Interest of Amici Curiae. Many other agricultural commodities produced in the amici States are potentially subject to marketing orders. *See* 7 U.S.C. § 608c(2) (listing the "basic agricultural commodities" that are potentially subject to marketing orders). And while the orders currently in effect do not require producers to surrender title to their crops as the Raisin Marketing Order does, nothing prevents the Secretary from subjecting these or any other crop listed in § 608c(2) to a similar order in the future. *See* 7 U.S.C. § 608(3)(a).

To protect their citizens from unlawful government overreach, the amici States respectfully urge the Court to reverse the court of appeals' judgment and ensure that the Raisin Marketing Order does not stand as a model for evading the Takings Clause's just-compensation requirement.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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MARCH 2015

Supreme Court, U.S.
FILED
MAR 9 - 2015
OFFICE OF THE CLERK

No. 14-275

IN THE

Supreme Court of the United States

MARVIN D. HORNE, *et al.*

Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

On Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

1. Whether the government's "categorical duty" under the Fifth Amendment to pay just compensation when it "physically takes possession of an interest in property," *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012), applies only to real property and not to personal property.

2. Whether the government may avoid the categorical duty to pay just compensation for a physical taking of property by reserving to the property owner a contingent interest in a portion of the value of the property, set at the government's discretion.

3. Whether a governmental mandate to relinquish specific, identifiable property as a "condition" on permission to engage in commerce effects a *per se* taking.

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INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a public interest law firm and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law.[1]

WLF has regularly appeared before this and other federal courts in cases involving claims arising under the Fifth Amendment's Takings Clause. *See, e.g.*, *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 525 U.S. 302 (2002); *Brown v. Legal Found. of Washington*, 538 U.S. 216 (2003); *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511 (2012).

WLF is concerned that the decision below, unless overturned by this Court, will seriously erode property rights by undermining the ability of owners to obtain just compensation when the government seizes their personal property. An unbroken line of this Court's decisions upholds the *per se* right to compensation for government acquisition of private property, regardless of the type of property at issue. The Ninth Circuit's decision called that right into question by holding that the right to compensation is reduced when the property in question is personal property, not real property.

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; letters of consent have been lodged with the clerk.

WLF is also concerned that the decision below seriously misapplies the unconstitutional conditions doctrine. That doctrine vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up. But rather than applying that doctrine in a straightforward manner to the federal government's efforts to coerce raisin producers and handlers to abandon their property rights in return for government "permission" to sell raisins, the Ninth Circuit evaluated the government's coercion under a standard heretofore applied only to conditional government approvals of permits for new land uses that impose costs on the public. WLF strongly believes that the approach adopted by the court below—whereby it upheld the federal government's coercive appropriation of private property on the grounds that there existed a "rough proportionality" between the government's goal of stabilizing raisin prices and its seizure or raisins—emasculates the Takings Clause.

STATEMENT OF THE CASE

The facts of this case are set out in detail in the brief of Petitioners. WLF wishes to highlight several facts of particular relevance to the issues on which this brief focuses.

Respondent U.S. Department of Agriculture ("USDA") has ordered Petitioners ("the Hornes") to pay more than $700,000 after determining that the Hornes marketed raisins in violation of USDA's Raisin Marketing Order. *See* 7 C.F.R. Pt. 989. Before this Court, the Hornes do not continue to contest the

finding that they violated the marketing order. Rather, they contend that they were not required to comply because the government's enforcement action—an effort to seize nearly half of the Hornes' raisin crop—violated the Fifth Amendment's prohibition against seizing private property without providing just compensation.

The Raisin Marketing Order was issued in 1949 pursuant to the Agricultural Marketing Agreement Act of 1937 (AMAA). The order establishes a "reserve" program under which a specified portion of the yearly raisin crop must be set aside "for the account of" the federal government. *Evans v. United States*, 74 Fed. Cl. 554, 557 (2006). Pursuant to that program, a group created by the Raisin Marketing Order—the Raisin Administrative Committee (RAC)—each year determines what percentage of his crop a raisin producer is permitted to market. The portion that a producer may market is known as "free tonnage," and the remaining portion is known as "reserve tonnage." 7 C.F.R. §§ 989.66, 989.166.

Producers normally sell their raisins to "handlers," who process and pack the raisins. 7 C.F.R. § 989.15. Handlers pay producers only for the portion of delivered raisins designated as "free tonnage," the portion destined for sale on the open market. The Raisin Marketing Order "effects a direct transfer of title of a producer's 'reserve tonnage' to the government" and requires handlers to physically segregate reserve-tonnage raisins from free-tonnage raisins; the former are to be held by handlers "for the government's account." *Evans*, 74 Fed. Cl. at 558. In the two crop years at issue, 2002-03 and 2003-04, the

RAC determined that reserves should constitute (respectively) 47% and 30% of total raisin production, thereby ordering the seizure of that percentage of each producer's crop.

The RAC then determines how to dispose of its reserve raisins. It sells most of them (at a considerable discount to U.S. market rate) to exporters. A portion of the reserve raisins are donated to U.S. agencies (for example, for school lunches) or charitable organizations. The RAC deducts its expenses from sales proceeds, and any funds remaining after those deductions are distributed to raisin producers on a *pro rata* basis. The 2002-03 distribution to producers was at a rate well below their costs of production (and far below U.S. market prices). In 2003-04, the federal government paid *nothing* to producers, despite (by means of the reserve-raisin program) having seized and made use of 30% of the overall raisin crop.

For decades, the Hornes have been growing grapes and producing raisins. They eventually concluded that the Raisin Marketing Order was unfair to small producers who, like themselves, do not engage in exporting and thus are not in a position to benefit from the export subsidies offered by the RAC for reserve-tonnage raisins. The Hornes decided to cease selling their raisins to handlers and instead to perform their own packing and processing operations and to sell *all* of their raisins on the open market.

The RAC objected and demanded that the Hornes turn over the "reserve" portion of the raisins they had processed. When the Hornes refused the demand, the USDA initiated disciplinary proceedings

against them. At all stages of those proceedings, the Hornes argued that the RAC's reserve-raisin requirement violated the Fifth Amendment's prohibition against the uncompensated taking of private property and that therefore they should not be sanctioned for failing to abide by that requirement.

After an administrative hearing and appeal, the USDA concluded that the Hornes had become "handlers" by virtue of their packing and processing operations and had violated USDA regulations by failing to set aside reserve-tonnage raisins for the RAC during the 2002-03 and 2003-04 crop years. Pet. App. 97a-98a. The USDA ordered the Hornes to pay $484,000, the market value of the raisins that they sold (on behalf of themselves and a number of neighbors) instead of turning them over to the RAC's reserve program pursuant to the Raisin Marketing Order. *Id.* at 109a-110a; 123a. It also imposed a civil penalty of $178,000 for the violation. *Id.* at 98a, 122a.

On judicial review, the district court upheld the USDA's decision. *Id.* at 125a-190a. The Ninth Circuit affirmed. *Id.* at 220a-241a. The appeals court concluded that it lacked jurisdiction to hear the Hornes' Takings Clause claim; it held that the Tucker Act required that any such claim be filed in the Court of Federal Claims. *Id.* at 236a.

This Court granted review and reversed on the jurisdictional issue. *Horne v. Dep't of Agriculture*, 133 S. Ct. 2053 (2013) ("*Horne I*"). It held that raisin handlers may raise takings-based defenses in enforcement proceedings initiated by the USDA; and that the federal courts have jurisdiction to adjudicate

those defenses in connection with any subsequent appeals. *Id.* at 2063.

On remand, the Ninth Circuit rejected the Hornes' Takings Clause claim. Pet. App. 1a-29a. The court initially concluded that the Hornes had not been subjected to a "paradigmatic taking," which the court defined as occurring "when the government appropriates or occupies private property." *Id.* at 15a. It reached that conclusion "because the government neither seized any raisins from the Hornes' land nor removed any money from the Hornes' bank account." *Ibid.* Accordingly, the court concluded, it was required to "enter the doctrinal thicket of the Supreme Court's regulatory takings jurisprudence." *Id.* at 16a.

The Ninth Circuit said that the Raisin Marketing Order fell within none of the three categories of "regulations" that "work a categorical, or per se, taking:" (1) a "permanent physical invasion of real property"; (2) regulations depriving owners of all economically beneficial use of their real property; and (3) a category limited to certain land-use exactions. *Id.* at 16a-28a. Citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Court held that the *per se* taking rule for "permanent physical invasion" of property applies only to real property, not to personal property such as raisins. *Id.* at 18a-20. It held that the *per se* taking rule for "permanent physical invasion" was inapplicable for a second reason: "the Hornes did not lose all economically valuable use of their personal property" but rather were entitled to receive the net proceeds from reserve-tonnage raisin sales. *Id.* at 20a-21a.

The Ninth Circuit determined that "the most faithful way to apply the Supreme Court's precedents to the Hornes' claims" was to apply the "nexus and rough proportionality rule" established by this Court's land-use exaction case law. *Id.* at 23a. Applying that rule, the appeals court determined that the reserve-raisin requirement did not constitute a taking of private property because a "nexus" existed between the requirement and the AMAA's goal of establishing orderly agricultural markets, and because the requirement (as well as the fine the USDA imposed on the Hornes) was "roughly proportional" to that goal. *Id.* at 26a-27a.

SUMMARY OF ARGUMENT

This case is most appropriately analyzed under the unconstitutional conditions doctrine. That doctrine "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013). Under the unconstitutional conditions doctrine, the government may not condition its grant of a benefit to a person on that person's agreement to abandon a constitutional right.

We will concede for the sake of argument that a license to engage in raisin sales or other normal commercial activity is a "benefit" that the government is entitled to grant or deny in appropriate circumstances. Even so, the unconstitutional conditions doctrine bars USDA from conditioning its grant of the right to sell raisins on the seller's acquiescence to the uncompensated seizure of a

significant portion of his raisin crop. As the Hornes have demonstrated, the demand that they set aside reserve-tonnage raisins and deliver them to the RAC is a *per se* taking in violation of the Fifth Amendment. By making that demonstration, the Hornes have also demonstrated that the USDA violated the unconstitutional conditions doctrine when it sought to condition their participation in the commercial raisin market on their acquiescence to the taking.

In seeking to demonstrate that the reserve-raisin requirement is not an unconstitutional condition on authorized marketing, the Ninth Circuit's relied on land-use exaction case law, principally *Nollan* and *Dolan*.[2] That reliance is misplaced. *Nollan* and *Dolan* "involve a special application of [the unconstitutional conditions] doctrine" to cases in which real property owners seek land-use permits. *Koontz*, 133 S. Ct. at 2594. Local governments often tell property owners that their permit applications will be approved only if the property owners give some property to the government. The Court has recognized that not all such conditional permit grants are unconstitutional; that is so because the condition is often imposed to offset the harm to others likely to arise from an owner's intensified land use. The Court has upheld property exactions imposed on land-use permit applicants so long as a nexus exists between the exaction and the harm that the government is seeking to offset, and there exists a "rough proportionality" between the two.

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[2] *See Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

Nollan and *Dolan* are inapplicable here because the USDA has not identified any similar public harm that the reserve-raisin requirement is intended to offset. For example, in 2002-03 producers were permitted to sell 53% of their raisin crop as free-tonnage raisins. There is no suggestion that the sale of free-tonnage raisins caused any harm, either to the consuming public or to the USDA's efforts to maintain "stable" (*i.e.*, high) prices. Had there been any such harm, the RAC would not have approved the free-tonnage sales. Under those circumstances, the seizure of the other 47% of producers' raisin crops cannot be deemed an effort to impose on producers the costs of the (nonexistent) harm that arises from the USDA's approval of free-tonnage raisin sales. To the extent that the alleged public harm is the sale of reserve-tonnage raisins, that harm can be eliminated by restricting or altogether banning such sales, without any need for the USDA to seize private property. Accordingly, the unconstitutional conditions doctrine should be applied with full force to this case, not the watered-down version applied by *Nollan* and *Dolan* in land-use exaction cases.

Of course, the condition imposed on the Hornes—no marketing of any raisins is permitted unless they agree to seizure of reserve-tonnage raisins—is an unconstitutional condition if and only if the proposed seizure is, in fact, an uncompensated government taking of private property within the meaning of the Fifth Amendment. The Ninth Circuit's conclusion that the reserve raisin requirement is not such a taking is based on a clear misreading of this Court's case law.

The Ninth Circuit erred in concluding that the Court's long-established *per se* taking rule—that a taking always occurs whenever the government either takes title to or physically occupies property—applies only to real property and not to personal property. Numerous decisions of this Court have held that the *per se* rule fully applies to personal property. The Ninth Circuit's holding to the contrary is based on a misreading of *Lucas* as well as *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

The appeals court also erred in concluding that the seizure of reserve-tonnage raisins should not be deemed a *per se* taking because the Raisin Marketing Order reserves to producers a contingent interest in a portion of the raisins' value. The *per se* rule has never been limited to instances in which the government seizes 100% of the value of property. If it were actually limited in that manner, the government could, for example, seize the right to earn interest on a bank account while leaving the bank account holder's principal intact. But the Court has expressly held that such seizures constitute *per se* takings. *Brown v. Legal Found. of Washington*, 538 U.S. 216, 235 (2003). A *per se* taking occurs whenever the government seizes any of the major sticks in the bundle of rights that constitute property—such as "the right to possess, use and dispose of" the property. *Phillips v. Washington Legal Found.*, 524 U.S. 156, 170 (1998). Thus, the Court found a *per se* taking when the government interfered with a property owner's right to exclusive use of his property by requiring him to provide public access to his marina, even though the interference only slightly decreased the marina's value. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

Finally, the Ninth Circuit erred in concluding that *per se* takings analysis is inapplicable to the threatened seizure of the Hornes' raisins because no raisins or bank accounts were actually seized. That conclusion overlooks that: (1) no raisins were seized only because the Hornes resisted the RAC's demands; and (2) their resistance resulted in USDA fines totaling more than $700,000. *Horne I* explicitly held that the Hornes were entitled to raise a takings-based defense to the USDA's efforts to fine them. If, as the Hornes have demonstrated, the seizure they resisted would have amounted to a *per se* taking, then the same Takings Clause analysis ought to apply to their defense against the USDA's fines arising from that resistance.

ARGUMENT

I. THE UNCONSTITUTIONAL CONDITIONS DOCTRINE BARS USDA FROM CONDITIONING ALL COMMERCIAL ACTIVITY ON PRODUCERS' ACQUIESCENCE TO RAISIN SEIZURES

The federal government has a long history of assisting farmers, both with direct subsidies and by restricting supply in an effort to support prices. Most government efforts to restrict crop supplies have taken the form of quotas that limit the permitted output of individual farmers. While WLF questions the economic rationality of such quota programs, their constitutional status is not at issue here.

The Raisin Marketing Order takes an unusual and entirely different approach to restricting supply. It makes no effort to restrict the acreage devoted to

cultivating grapes or the quantity of raisins being produced. Rather, after a growing season has begun (and farmers have already made a substantial investment in their crops) the RAC determines the likely size of that year's raisin crop. It then determines what percentage of the total crop must be designated as reserve-tonnage raisins in order to ensure that the supply of raisins available on the open market will remain relatively constant from year to year. The RAC then seizes the reserve-tonnage raisins and attempts to dispose of them in a manner that will not cause U.S. market prices to decrease. Importantly, the USDA has never argued that a quota system—which by definition does not entail any seizure of crops by the government and thus intrudes on private property rights far less than does the Raisin Marketing Order—would not be equally effective in stabilizing raisin prices at the elevated level apparently desired by the USDA.

No one is forced to engage in the business of producing or handling raisins. In that limited sense, no one is forced to acquiesce to the RAC's seizure of reserve-tonnage raisins. Anyone who wishes to avoid such seizures can simply decide to stop producing raisins for commercial sale and withdraw from the market.

Nonetheless, the Court has long made clear that the Constitution does not give the government free rein to deal with a citizen as it likes whenever the citizen could avoid the effects of the government's actions by abjuring receipt of some government benefit. Rather, a well-developed body of case law, known collectively as the unconstitutional conditions doctrine, prevents the government from coercing people into giving up rights

protected by the Constitution. *See, e.g., FCC v. League of Women Voters of California*, 468 U.S. 364 (1984) (striking down federal statute prohibiting television and radio stations from broadcasting editorials if they voluntarily accept federal grant funds); *Pickering v. Bd. of Education*, 391 U.S. 563 (1968) (school districts may not require public school teachers, as a condition of employment, to relinquish their First Amendment rights to speak in a private capacity on matters of public concern).

In *Koontz*, the Court explained the application of the unconstitutional conditions doctrine to government efforts to bypass restrictions imposed by the Fifth Amendment's Takings Clause, which prohibits the taking of private property "without just compensation." The Court said:

> [L]and-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than the property it would like to take. By conditioning a building permit on the owner's deeding over a public right-of-way, for example, the government can pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation. So long as the building permit is more valuable than any just compensation the owner could hope to receive for the right-of-way, the owner is likely to accede to the government's demand, no matter how unreasonable. Extortionate demands of this sort frustrate the

> Fifth Amendment right to just compensation, and *the unconstitutional conditions doctrine prohibits them.*

Koontz, 133 S. Ct. at 2594-95 (emphasis added) (citations omitted).

Raisin producers are in a similarly vulnerable position. They are likely to have invested substantial capital in their raisin-production businesses, so withdrawing from the businesses would likely entail substantial losses. Accordingly, when the federal government demands that they either acquiesce to the seizure of a significant portion of their raisin crops or cease selling raisins altogether, they can legitimately claim to have been coerced into acquiescence. The unconstitutional conditions doctrine is intended to guard against just such coercion.

The Court has stated that "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected [right,] even if he has no entitlement to that benefit." *United States v. American Library Ass'n, Inc.*, 539 U.S. 194, 210 (2003). The key issue in every unconstitutional conditions case, accordingly, is whether the condition imposed by the government would violate the Constitution if imposed directly by the government (*i.e.*, not simply as a condition for receipt of a government benefit).[3] *See,*

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[3] As WLF explains more fully in Section II, *infra*, the RAC's confiscation of reserve-tonnage raisins would constitute a *per se* taking in violation of the Takings Clause if it were imposed on raisin producers without regard to whether they chose to market their raisins commercially.

e.g., *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 59-60 (2006) (federal statute requiring universities that accepted federal funding to permit on-campus military recruiting did not violate unconstitutional conditions doctrine, because the Constitution did not prohibit the federal government from directly requiring all universities to permit on-campus military recruiting).

The Court has, on occasion, imposed limits on the unconstitutional conditions doctrine in circumstances in which the government's grant of a discretionary benefit may impose costs on the government itself or on the public. For example, in the context of land-use permits, the Court has recognized that "many proposed land uses threaten to impose costs on the public." *Koontz*, 133 S. Ct. at 2595. The *Nollan/Dolan* line of cases developed as an effort to balance application of the unconstitutional conditions doctrine with the government's desire to impose exactions on land-use permit applicants to ensure that the applicants themselves bear the costs created by their new land uses. *Id.* at 2594-95.

In *Nollan*, a property owner challenged a government requirement that he give property rights to the government (an easement allowing the public to walk along his shoreline) in return for a permit to build a larger residence. In *Dolan*, a property owner challenged a similar government exaction (an easement allowing a bicycle/pedestrian path along a waterway well-distant from the commercial building he sought to expand) imposed as a condition for permission to expand his commercial business. "In each case, the Court began with the premise that, had

the government simply appropriated the easement in question, this would have been a *per se* physical taking." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 546 (2005). But the Court held that the unconstitutionality of direct government appropriation of the property should not be the sole factor entering into its unconstitutional conditions determination in those two case, because it recognized that the proposed intensified land uses in the two cases imposed costs on the entire community.

For that reason, *Nollan* and *Dolan* imposed limitations on the unconstitutional conditions doctrine in the context of land-use exactions. *Nollan* held that a land-use exaction was permissible if an "essential nexus" exists between the "legitimate state interest" that the government is pursuing and the property exaction it demands as a condition for approval of the land-use permit. *Nollan*, 483 U.S. at 837.[4] *Dolan* added a refinement to that rule: there must exist a "rough proportionality" between the government's interest and the property exaction being demanded. *Dolan*, 512 U.S. at 388-391.[5]

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[4] The Court ultimately struck down the land-use exaction as a violation of the Takings Clause. The Court determined that no "essential nexus" existed between the public costs that the government was seeking to alleviate (a larger residence would obstruct views of the ocean from the roadway on the landward side of the property) and the proposed exaction (an easement that would allow the public to walk along the landowner's shoreline). *Id.*

[5] The Court in *Dolan* again struck down the land-use exaction as a violation of the Takings Clause. While recognizing that the proposed expansion of the commercial building would increase flooding concerns and traffic congestion, the Court

The Ninth Circuit's reliance on *Nollan* and *Dolan* as a basis for denying the Hornes' takings defense was misplaced. Land-use exaction cases such as *Nollan* and *Dolan* involve a "special application of [the unconstitutional conditions] doctrine"—special because the Court has recognized that public costs associated with intensified land use may on occasion justify exactions that would otherwise violate the unconstitutional conditions doctrine. *Koontz*, 133 S. Ct. at 2594-95. *Nollan* and *Dolan* are inapplicable here because the USDA has not identified any similar harm arising from the sale of free-tonnage raisins—a harm that might arguably justify the seizure of reserve-tonnage raisins as a means of imposing the costs of those harms on handlers and producers. In the absence of such harm, the unconstitutional conditions doctrine prohibits the USDA's attempted "conditional" seizure of the Hornes' raisins once it is determined that a direct seizure would violate the Takings Clause.

The Ninth Circuit stated that the Raisin Market Order's seizure mandate is constitutionally permissible because it furthers the AMAA's goal of "obtaining orderly market conditions." Pet. App. 26a. But the appeals court never addressed the critical question posed by *Nollan* and *Dolan*: is the marketing activity that the USDA is purporting to authorize—that is, authorization of the sale of 53% of the total raisin crop as free-tonnage raisins—the cause of any public harm? If not, then the government's otherwise-

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concluded that the government's goal of alleviating those concerns was not roughly proportional to the seizure of a pedestrian/bicycle "greenway" some distance from the proposed expansion. *Id.* at 394-96.

unconstitutional condition is impermissible.

The record is clear that the free-tonnage raisin sales authorized by the RAC do not cause any public harm, and the government has never contended otherwise. For example, in 2002-03, producers were permitted to sell 53% of their raisin crop as free-tonnage raisins. There is no plausible argument that *consumers* were injured by those sales. Nor can USDA argue that those sales injured "orderly market conditions," because if they did, the RAC would never have approved such sales. Under those circumstances, the seizure of the other 47% of producers' raisin crops cannot be deemed an effort to impose on producers the costs of the (nonexistent) harm that arises from the USDA's approval of free-tonnage raisin sales.

Moreover, even if the *Nollan/Dolan* "nexus and rough proportionality" rule were deemed applicable here, the Ninth Circuit erred in determining that the USDA has satisfied that test. There is no "nexus" between the creation of "orderly market conditions" and the seizure of reserve-tonnage raisins because such seizure is totally unrelated to maintaining the high prices apparently desired by the RAC. The RAC seeks to maintain "orderly marketing conditions" by reducing supply (with the goal of driving up prices in the open market), but seizing private property plays no necessary role in restricting supply. If the RAC wishes to decrease the supply of raisins on the open market, the most direct way to do so is to limit the amount of raisins that individual handlers and producers may sell; the seizure of raisins is a totally extraneous

measure.[6]

II. THE DIRECT SEIZURE OF RAISINS IS A *PER SE* VIOLATION OF THE TAKINGS CLAUSE

The Raisin Marketing Order requires handlers to acquiesce in the RAC's seizure of a significant percentage of the raisin crop each year, grants the RAC virtually unlimited discretion in determining how to dispose of the reserve-tonnage raisins, and authorizes the RAC to pay all of its expenses out of the proceeds of the sale of those raisins. Direct physical appropriation of private property in this manner by the government has long been understood to constitute a *per se* taking for Fifth Amendment purposes. That understanding does not change simply because producers sometimes (but certainly not always) are paid a small fraction of the value of the seized raisins, out of the net proceeds of the sale of reserve-tonnage raisins. The Ninth Circuit's conclusion that the USDA's raisin seizures are not subject to the *per se* takings rule was based on a misreading of this Court's case law.

As noted above, the key issue in every unconstitutional conditions case is whether the restriction imposed by the government would violate the Constitution if imposed directly by the government

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[6] WLF does not mean to suggest that it supports imposing such limits on raisin sales. Production and sales quotas are inefficient, always harm consumers, and often harm farmers. But at least they do not raise the Fifth Amendment Takings Clause concerns implicated by the Raisin Marketing Order.

(*i.e.*, not simply as a condition for receipt of a government benefit). If so, the unconstitutional conditions doctrine in most cases (including this case) bars imposition of the government's burden as a condition for receipt of a benefit. The Fifth Amendment does, indeed, prohibit the direct seizure of raisins by the government in the absence of just compensation, and thus the unconstitutional conditions doctrine prohibits the USDA from conditioning its grant of the right to sell raisins on the seller's acquiescence to the uncompensated seizure of a significant portion of his raisin crop.

A. The *Per Se* Taking Rule Applies to Seizures of Personal Property

The Court has repeatedly held that a taking always occurs—*i.e.*, a *per se* taking—whenever the government either takes title to or possession of property. *See, e.g., United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951); *Loretto*, 458 U.S. at 426 (1982); *Brown*, 538 U.S. at 233; *Arkansas Game and Fish Comm'n*, 133 S. Ct. at 518. In none of those cases has the Court suggested that the *per se* taking rule is any less applicable when the property at issue is personal property, not real property.

The Ninth Circuit nonetheless concluded that the *per se* rule is not applicable to personal property and thus that the seizure of reserve-tonnage raisins does not constitute a *per se* taking. Pet. App. 18a. The appeals court sought support for that conclusion in *Lucas*, which held that government *regulation* of real property constitutes a *per se* taking if it deprives the property owner of *all* economically beneficial use of his

or her land. *Lucas*, 505 U.S. at 1019. *Lucas* emphasized that its new *per se* rule applied only to regulation of real property, not to regulation of personal property:

> [I]n the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale.) *See Andrus v. Allard*, 444 U.S. 51, 66-67 (1979) (prohibition on sale of eagle feathers).

Id. at 1027-28.

Lucas involved government *regulation* of property; neither *Lucas*'s language nor its rationale supports an argument that personal property is entitled to lesser protection under the Takings Clause from government *expropriation* of property. *Lucas* explained the Fifth Amendment's greater tolerance of government *regulation* of personal property by noting government's "traditionally high degree" of regulation of commercial dealings; but there is no tradition in this country of the government *seizing* property without compensation, whether the property be real or personal. Indeed, while upholding government restrictions on eagle-feather sales, the Court in *Andrus* went out of its way to note that the government had not actually *seized* any feathers. *Andrus*, 444 U.S. at 66-67.

The Ninth Circuit dubbed *Loretto* the

"representative case" for the rule that the government's permanent physical occupation of property constitutes a *per se* taking of the property. Pet. App. 16a-17a. Noting that *Loretto* involved a permanent physical occupation of real property, the appeals court said it saw "no reason to extend *Loretto* to govern controversies involving personal property." Pet. App. 20a. But nothing in *Loretto* suggests that the Court was limiting the *per se* rule to real property.

More importantly, the Ninth Circuit failed to explain the numerous cases in which the Court has applied the *per se* rule to seizures of personal property. *See, e.g., Brown*, 538 U.S. at 235 (applying "a *per se* approach" to takings claims arising from the government's confiscation of money); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980) (same). *Webb's* explicitly rejected the government's argument that its confiscation of money should be judged under the multi-factor balancing test set forth in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), because the Court deemed the confiscation to be "a forced contribution to general government revenues." *Id.*

In sum, the *per se* rule that applies whenever the government takes title to or physically takes possession of property covers all types of property—both real and personal. Indeed, the USDA's brief opposing the grant of review in this case pointedly declined to support the Ninth Circuit's holding that the Fifth Amendment provides a reduced level of protection to personal property.

B. The *Per Se* Taking Rule Applies Even When the Property Owner Is Allowed to Keep a Contingent Interest in a Portion of His Property

The Ninth Circuit articulated a second ground for declining to apply the *per se* taking rule to the RAC's seizure of raisins. It concluded that "the reserved raisins are not permanently occupied" because producers are entitled to receive the net proceeds from all raisin sales conducted by the RAC (*i.e.*, the proceeds remaining, if any, after the RAC deducts all its expenses). Pet. App. 20a-22a. The appeals court concluded that the possibility of a payment (not realized in 2003-04) negated application of the *per se* taking rule. *Ibid.* That conclusion is directly contrary to this Court's case law.

The Ninth Circuit cited *Loretto* in support of its view, but it badly misquoted that decision. The appeals court said that *Loretto* "applies only when *each* 'strand from the bundle of property rights' is 'chop[ped] through . . . taking a slice of every strand.'" Pet. App. 20a-21a (quoting *Loretto*, 458 U.S. at 435). This Court never indicated that *Loretto* had such limited application. While the Court stated that a *per se* taking has occurred when the government cuts every "strand from the bundle of property rights," it did not state that the *per se* rule "only" applies in such circumstances.

Indeed, the Court later characterized government acquisition of the easements at issue in *Nollan* and *Dolan* as effecting a "*per se* physical taking"

of property. *Lingle*, 544 U.S. at 546. An easement merely cuts one of the "strands from the bundle of property rights": the right to exclude others. The property owners in *Nollan* and *Dolan* were never threatened with the loss of any other rights in their property. The Court nonetheless concluded that the government's efforts to coerce the property owners to give up a single strand in their bundle of property rights was subject to the *per se* rule. Indeed, the Court has stated explicitly that the *per se* rule applies not merely to the seizure of the entirety of an owner's property but also to seizure of "*an* interest in property." *See Arkansas Game & Fish Comm'n*, 133 S. Ct. at 518 ("[w]hen the government physically takes possession of *an interest in property* for some public purpose, it has a categorical duty to compensate the former owner") (quoting *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 525 U.S. 302 (2002)) (emphasis added).

The *per se* rule has never been limited to instances in which the government seizes 100% of the value of property. If it were actually limited in that manner, the government could, for example, seize the right to earn interest on a bank account while leaving the bank account holder's principal intact. But the Court has expressly held that such seizures constitute *per se* takings. *Brown*, 538 U.S. at 235. A *per se* taking occurs whenever the government seizes any of the owner's "interests" in the property—such as "the right to possess, use and dispose of" the property. *Phillips*, 524 U.S. at 170. Thus, the Court found a *per se* taking when the government interfered with a property owner's right to exclusive use of his property by requiring him to provide public access to his marina,

even though the interference only slightly decreased the marina's value. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

The fact that producers whose raisins are seized may ultimately be partially compensated for their losses (at pennies on the dollar) is relevant to computing the amount of "just compensation" to which they are entitled. It does not negate the fact of the seizure, a fact that triggers application of the *per se* rule.

Finally, the Ninth Circuit suggested that the Hornes cannot establish a Fifth Amendment violation because they have actually benefitted from the Raisin Marketing Order, which allegedly has caused raisin prices to rise and thereby has increased the Hornes' profits from their raisin sales. Pet. App. 20a-21a. A Fifth Amendment claimant must demonstrate, of course, that he has been denied just compensation; and the government cannot be deemed to have denied just compensation when the amount of loss (and thus the just compensation) is zero dollars.

The Hornes have explained that there are numerous reasons to doubt that the Raisin Marketing Order has actually benefitted them. WLF will not repeat that explanation here. We note only that the Ninth Circuit made no findings on the amount of losses the Hornes would have suffered had they acquiesced to the RAC's demand that they relinquish reserve-tonnage raisins. Accordingly, the appeals court's unsupported speculation that the Hornes actually benefitted from the Raisin Marketing Order does not provide any basis for affirming its decision.

C. The Fact That No Raisins Were Ever Seized from the Hornes Does Not Prevent Them from Asserting the *Per Se* Taking Rule in Defending Against the USDA's Enforcement Proceedings

The Ninth Circuit also asserted that *per se* takings analysis is inapplicable to the threatened seizure of the Hornes' raisins because no raisins or bank accounts were actually seized. Pet. App. 15a-16a. That assertion makes little sense. *Horne I* held that the Hornes are entitled to defend against the USDA's administrative proceedings by raising a "takings-based defense." *Horne I*, 133 S. Ct. at 2063. Such a defense consists of a claim that they acted within their rights in resisting the RAC because the RAC's demands amounted to a *per se* taking for which RAC was unwilling to pay just compensation. In order to evaluate the Hornes' defense, the Court must determine whether the procedural steps demanded by the RAC would have constituted a *per se* taking had the Hornes not resisted. Accordingly, the fact that no taking actually occurred is irrelevant to the issue of whether the *per se* rule is actually applicable to the Hornes' claims.

Koontz rejected an argument similar to the one asserted by the Ninth Circuit. Like *Nollan* and *Dolan*, *Koontz* involved a constitutional challenge to a land-use exaction. In *Nollan* and *Dolan*, local governments granted the landowners' land-use applications but included as a condition that the landowners had to grant specified easements. *Koontz* differed in that the land-use permit application was not actually approved;

rather, the landowner was informed that it would be approved only if he first complied with the government's proposed exaction.

The government asserted that Koontz (the landowner) should not be permitted to raise his unconstitutional conditions claim because it had never granted the land-use application and thus had never actually pressured the landowner to accept any unconstitutional conditions. The Court rejected that assertion, explaining that "[t]he principles that undergird our decisions in *Nollan* and *Dolan* do not change depending on whether the government *approves* a permit on the condition that the applicant turn over property or *denies* a permit because the applicant refuses to do so." *Koontz*, 133 S. Ct. at 2595 (emphasis in original). Similarly, whether the Court applies the *per se* rule to the raisin-reserve requirements should not depend on whether a handler/producer acquiesces in the RAC's demands and then files a Takings Clause claim seeking just compensation, or whether the handler/producer resists the RAC's demands and then files a takings defense in response to disciplinary proceedings filed by the USDA.

CONCLUSION

Amicus curiae Washington Legal Foundation requests that the Court reverse the decision of the court of appeals.

Respectfully submitted,

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Dated: March 9, 2015